*Together with No. 496, Lawyers County Trust Co. v. Reichert et al.

Card 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 292

MINNIE LERNER, PETITIONER,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, WISCONSIN, JAKE RAKITA, HARRY BLUMENFELD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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DISTRICT COURT OF THE UNITED STATES

Plac

For the Eastern District of Wisconsin.

United States of America,
Eastern District of Wisconsin. } ss:

At a stated term of the District Court of the United States of America, for the Eastern District of Wisconsin, begun and held at the City of Milwaukee, in said district, on the first Monday, (being the second day) of October, A. D. 1933, present the Honorable Ferdinand A. Geiger, District Judge, presiding:

Among other the following proceedings were had, to-wit:

In the Matter of
Minnie Lerner,
Bankrupt. } In Bankruptcy.

Be it remembered that heretofore, to-wit: on the 6th day of October, A. D. 1933, came the bankrupt and filed her petition for discharge in bankruptcy as follows:

d Oct. 6, 33. 2 Oct. 6, 1933—BANKRUPT'S PETITION FOR DISCHARGE, filed as follows:

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Eastern District of Wisconsin.

In the Matter of
Minnie Lerner,
Bankrupt. } In Bankruptcy.

To the Honorable, Ferdinand A. Geiger, Judge of the District Court of the United States for the Eastern District of Wisconsin:

Minnie Lerner, of the City of Milwaukee, in the County of Milwaukee, and State of Wisconsin, in said District, respectfully represents that on the 22nd day of May last past she duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that she duly surrendered all her property and rights of property, and she fully complied with all the requirements of said acts and of the orders of the Court touching her bankruptcy.

Wherefore, she prays that she may be decreed by the Court to have a full discharge from all debts provable against her estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated, this 4th day of October, 1933.

MINNIE LERNER,
Bankrupt.

Endorsed: "Filed Oct. 6, 1933. B. H. Westfahl, Clerk."

d Oct. 11, 33. 3 Oct. 11, 1933—REFEREE'S NOTICE TO CREDITORS, filed as follows:

• • (Caption) • •

Notice Is Hereby Given, that the above named bankrupt has filed her petition for discharge; that the same will be heard before said Court at Milwaukee, in said District on November 18th, 1933, at ten o'clock in the forenoon, and that

all creditors may appear at said time and place and show cause why the same should not be granted.

Dated, Milwaukee, Wisconsin, this 10th day of October, 1933.

F. C. WESTFAHL, JR.,
Referee in Bankruptcy.

Endorsed: "Filed Oct. 11, 1933. B. H. Westfahl, Clerk."

4 Nov. 17, 1933—Appearance of First Wisconsin National Bank of Milwaukee, in opposition to discharge, filed as follows: Fi

• • (Caption) • •

APPEARANCE IN OPPOSITION TO DISCHARGE.

Now comes the First Wisconsin National Bank of Milwaukee, a creditor of the above named bankrupt, by John C. Warner, a member of the firm of Wood, Warner & Tyrrell, its Attorney in fact and duly authorized agent, and appears in opposition to the said bankrupt's discharge and requests leave of the Court that its time for filing specifications of grounds of opposition to said discharge be extended to November 28, 1933.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE,
By: JOHN C. WARNER (Sgd.)
Its Attorney.

Endorsed: "Filed Nov. 17, 1933. B. H. Westfahl, Clerk."

5 Nov. 18, 1933—APPEARANCE OF JAKE RAKITA ET AL. IN OPPOSITION TO DISCHARGE OF BANKRUPT, filed as follows: Filed 193

• • (Caption) • •

November 18 ,A. D. 1933.

Before the Honorable F. A. Geiger, Judge.

This day came Jake Rakita et al, creditors in the above entitled matter by their counsel Mr. Ben Z. Glass and in open

Court entered their appearance to oppose the discharge of the above named bankrupt.

Endorsed: "Filed Nov. 18, 1933. B. H. Westfahl, Clerk."

Nov. 28. 6 Nov. 28, 1933—Order granting objecting creditors time to file specifications of objections.

Specifications of Objections by Jake Rakita, Sarah Rakita, Harry Blemenfeld and Dora Blemenfeld, filed as follows:

* * (Caption) * *

SPECIFICATIONS OF GROUNDS OF OPPOSITION TO DISCHARGE.

At Milwaukee, in Milwaukee County and State of Wisconsin, on November 28th, 1933, came Jake Rakita, of said City and County and State, and made oath and said:

That he is a creditor of Minnie Lerner, Bankrupt above named, interest in the estate of the said Minnie Lerner, Bankrupt, and does hereby oppose the granting to the said Minnie Lerner of a discharge from her debts and for the grounds of such opposition does file the following specifications hereinafter set forth.

Specifications.

1. The claim of said affiant arises out of a mortgage dated June 4, 1929 and executed by Minnie Lerner and Mayr Lerner, her husband, to Jake Rakita and Sarah Rakita and Harry Blumenfeld and Dora Blumenfeld, upon which said mortgage there was due and owing on or about October 16, 1932, the principal sum of $3650.00.

That on or about Oct. 17, 1932, an action was commended in the Circuit Court of Milwaukee County by this deponent and his co-owners of said note, against the said Minnie Lerner and Mayr Lerner, her husband, to recover the amount then due upon said note.

That on or about December 17, 1932, the Hon. John C. Kleczka, a Circuit Judge in and for Milwaukee County, ordered said action advanced for trial and placed upon the jury day calendar.

That said action was reached for trial on February 7, 1933

and was tried before the court and a jury, and the judgment was ordered entered for the amount due on said note in favor of this deponent and his co-owners of said note and
7 against Minnie Lerner and Mayr Lerner, bankrupts, on February 9, 1933. That judgment upon said order was entered on February 13, 1933.

That execution was issued on February 13, 1933, and was thereafter returned by the sheriff in and for Milwaukee County, unsatisfied.

That on May 8th, 1933, this deponent and the co-owners of said judgment filed in the office of the Clerk of this court a petition seeking to obtain an order of this court adjudicating the said Minnie Lerner and Mayr Lerner, bankrupts, under and pursuant to the bankruptcy act of the United States.

That for the grounds of this opposition, this deponent on behalf of himself and the co-owners of said judgment, being authorized so to do, makes and files the following specifications in opposition to the discharge of the said Minnie Lerner, bankrupt, from his debts, in that said bankrupt has transferred, removed, and concealed certain of her property with the specific intent to hinder, delay or defraud her creditors in the following manner:

1. On or about November 17th, 1932, the bankrupt and Mayr Lerner, her husband, caused to be filed with the department of state in and for the State of Wisconsin, at Madison, Wisconsin, articles of organization of the Lerner Realty Company and also caused said articles to be filed with the Register of Deeds of Milwaukee County, Wisconsin.

2. That on November 18th, 1932, said defendant transferred by warranty deed to the corporation known as the Lerner Realty Company, formed at her instance, certain real estate, being all of the real estate then owned by her either in her own name or in survivorship with her husband, Mayr Lerner,
8 and that said real is described as follows:

Lot numbered 3 and all that part of Lot numbered 2 which lies south of Harmon Street, all in Block 24, in Lynde & Vliet's Addition in the N. W. ¼ of Section 20 in Township 7 North, of Range 22 East, in the City of Milwaukee, together with the buildings and improvements thereon.

Lot 15 in Block 4 in Harrison Park, and Lot 2 in Block 8 in Vernon Heights, being in the North West ¼ of Section 14 in Township 7 North, of Range 21 East, in the City of Milwaukee.

Lot 5 Block 3 in Graham & Osborn's Subdivision, being the re-subdivision of Lots 15 to 21 inclusive, in plot of the re-sub-

division of Lots 2 to 8 inclusive, in E. C. Freihube's Subdivision in the S.W. ¼ of Section 6 in Township 7 North, of Range No. 22 East, in the 20th Ward of the City of Milwaukee.

Lot 1, the East 10 feet of Lot 2 and the East 30 feet of Lot 20, in Block 1 in Kennich Heights, in the N.E. ¼ of Section 3, Township 6 North, of Range 21 East, in the first Ward of the City of West Allis, also including all trade fixtures such as pumps, tanks and all other articles used in connection with the filling station, excepting only air pump and boiler belonging to tenant.

That part of Lot 13, Block 4 in Connells Subdivision bounded and described as follows: Commencing at the southwesterly corner of Lot 13, thence North 40′ West along the East line of Lot 13, 82.88 feet to a point, thence West and parallel to the North line of Lot 13, 2 feet, to a point, thence South and parallel to the East line of Lot 13, 81.72 feet to a point in the northerly line of Atkinson Avenue, thence Southeasterly along the northerly line of Atkinson Avenue, 2.30 feet to the place of beginning, being the East 2 feet of the South 82.88 feet of Lot 13 and Lot 14, Block 4, Connell's Subdivision and that part of Lot 14, Block 4 Connell's Subdivision bounded and described as follows: Commencing at the Southwesterly corner of Lot 15, thence North along the West line of Lot 15, 109.14 feet to a point in the North line of Lot 15, thence East along the North line of Lot 15, 7.50 feet to a point, thence South and parallel to the West line of Lot 15, 113.33 feet to a point in the Northerly line of Atkinson Avenue, thence Northerly along said northerly line of Atkinson Avenue 863 feet to the place of beginning, being the West 7.50 feet of Lot 15, being a part of the Northeast ¼ of Section 7, in Township 7 North, of Range 22 East in the 25th Ward of the City of Milwaukee.

Lot 2 in Block 12 in the Continuation of Harrison Park being a subdivision of part of the N.E. ¼ of Section 14 in Township 7 North of Range 21 East in the 20th Ward of the City of Milwaukee.

Lot 7 in Block 11 in Harrison Park being a subdivision of a part of the N.E. ¼ of Section 14 in Township 7 North, of Range 21 East, in the 20th Ward of the City of Milwaukee, now in the 26th Ward of the City of Milwaukee.

3. That as deponent is informed and verily believes said bankrupt received for the transfer of said real estate, a certificate for 170 shares of the stock of said corporation with the view of placing the equities he held in these properties beyond

the reach of his creditors and with the specific intent of
9 protecting his equities and income from said real estate from the suits of hostile creditors and from the judgment liens of this deponent.

4. That on or about November 18th, 1932, as this deponent is informed and verily believes, said bankrupt caused to be issued by said Lerner Realty Company, to her daughter Sophie Steigman, 30 shares of the capital stock of said company without consideration.

5. That on or about November 18th, 1932, said bankrupt was one of the owners of the following described real estate, to wit:

The South Eleven feet (S. 11') of Lot Two (2), all of Lot Three (3), Block Twenty-four (24), Lynde's & Vliet's Subdivision in the City and County of Milwaukee, Wisconsin, commonly known as 1929-1931 N. 12th Street.

and on November 18th, 1932 said bankrupt conveyed said property to Lerner Realty Company. On November 30, 1932 said Lerner Realty Company conveyed, without consideration, said property to Mayr Lerner and Minnie Lerner, his wife. That on January 31, 1933 said bankrupt and her husband, Mayr Lerner, with intent to hinder, delay, or defraud the creditors of said bankrupt, transferred, removed and concealed said property by making a pretended mortgage upon said property on that date for the sum of Three Thousand Dollars ($3,000.00) to her sons Julius Lerner and Joseph P. Lerner, said mortgage having been given to said mortgagees without lawful consideration. Said property is income-producing, having aggregate monthly rentals at the present time of One Hundred Fifty-five Dollars ($155.00) per month. That with the intent to hinder delay or defraud her creditors said bankrupt, without consideration, on or about January 31, 1933, assigned, transferred and set over to her sons Julius Lerner and Joseph P. Lerner, all the rentals then due or which might thereafter become due and owing from all the tenants of said premises to Mayr Lerner.

10 This objecting creditor is informed and believes that one Isadore Blankstein is a relative of a child of said bankrupt and that said Isadore Blankstein is the sole owner of Isadore Blankstein Company. That on or about November 18, 1932 said bankrupt was the owner of the following three parcels of real estate located in Milwaukee County, Wisconsin, to-wit:

a. Lot 15 (15), Block Four (4), Harrison Park, and Lot Two (2), Block Eight (8), Vernon Heights.

b. Lot Five (5), Block Three (3), Graham & Osborn's subdivision.

c. Lot One (1) and E. Ten feet (10′) of Lot Two (2) and E. Thirty Feet (30′) of Lot Twenty (20), Block One (1), Kenneth Heights.

On that date said bankrupt conveyed said real estate to Lerner Realty Company. On or about March 15th, 1933, said bankrupt caused said Lerner Realty Company to execute and deliver a pretended mortgage for $3400.00 to Isadore Blankstein Company upon said real estate, without consideration. That said mortgage was caused to be made with the specific intent to hinder, delay or defraud the creditors of said bankrupt.

That on or about June 4, 1929, Mayr Lerner and Minnie Lerner, purchased the following described property.

Lots 16 and 17, Block 3, in Hanson & Milbrath's Subdivision No. 1 in the S.W. ¼ of Section 10, 6, 22, in Milwaukee County, Wisconsin.

That on or about August 19, 1931, Mayr Lerner and Minnie Lerner, his wife, deeded this property to her children, who gave Minnie Lerner, and Mayr Lerner, her husband, a mortgage for the sum of $4500.00. On or about November 3, 1933 said Minnie Lerner and Mayr Lerner, her husband, with intent to hinder, delay and defraud the creditors of said bankrupt, released said mortgage to the mortgagee thereof, this objecting creditor is informed and believes, for the sum of $1500.00.

That on or about February 20, or 21st, 1933, and after judgment was entered on the claim of this deponent as hereinbefore set forth, said bankrupt delivered to the First Wis-
11 consin National Bank of Milwaukee, a banking corporation, the certificate for 170 shares of stock of the Lerner Realty Company, as and for collateral for debts then due and owing by her to the said bank, without any new consideration and without assigning said certificate in writing. That the said delivery of said certificate of stock to said bank was made with the specific intent to hinder, delay or defraud this deponent and other creditors.

(Sgd) JAKE RAKITA.

Subscribed, acknowledged and sworn to before me the day and year above mentioned, said subscriber being known to me to be the person described in and who signed and swore to above instrument.

BEN Z. GLASS.
Notary Public, Milwaukee County, Wisconsin.

My Commission expires 1/7/34.

Leave is hereby granted to file the foregoing specifications of objections to discharge of the bankrupt.

(Sgd) F. A. GEIGER,
U. S. District Judge.

Endorsed: "Filed Nov. 28, 1933. B. H. Westfahl, Clerk."

12 Nov. 28, 1933—Specifications of objections of First Wisconsin National Bank, filed as follows: Filed Nov. 1933.

• • (Caption) • •

SPECIFICATIONS OF GROUNDS OF OPPOSITION TO DISCHARGE.

At Milwaukee, in the County of Milwaukee, and State of Wisconsin, on the 28th day of November, A. D. 1933, came A. G. CASPER, of said City, County and State aforesaid, and made oath and said:

That he is Cashier of First Wisconsin National Bank of Milwaukee, a national banking association, duly organized and existing and authorized to do business under and by virtue of the Acts of Congress of the United States, and hereinafter designated as objecting creditor.

That said creditor is doing business as 743 N. Water Street, Milwaukee, Wisconsin.

That affiant is that officer of said creditor whose duties most nearly correspond to those of Treasurer.

That affiant is duly authorized to make these specifications and does hereby oppose the granting to said bankrupt of a discharge from his debts, and for the grounds of this opposition does file the following specifications:

I.

That on or about November 18, 1932 Mayr Lerner, the husband of the bankrupt herein, was the sole owner of property described as 1929-1931 N. 12th Street, Milwaukee, Milwaukee County, Wisconsin. That on November 18, 1932 said Mayr Lerner conveyed said property to Lerner Realty Company. That on November 30, 1932 said Lerner Realty Company conveyed the said property to Mayr Lerner and Minnie Ler-
13 ner, his wife. That said bankrupt at a time subsequent to the first day of the twelfth month immediately preceding

the filing of the petition in bankruptcy herein, to-wit: on January 31, 1933, with intent to hinder, delay or defraud her creditors, transferred, removed and concealed, and permitted to be removed and concealed, certain of her property, to-wit:

The South Eleven Feet (S. 11′) of Lot Two (2), all of Lot Three (3), Block Twenty-four (24), Lynde's & Vliet's Subdivision in the City and County of Milwaukee, Wisconsin, commonly known as 1929-1931 N. 12th Street,

in that she did make, with her husband, Mayr Lerner, a pretended mortgage for Three Thousand Dollars ($3000.00) upon said real estate to her sons, Julius Lerner and Joseph P. Lerner, without consideration. That said property is income-producing, having aggregate monthly rentals at the present time of One Hundred Fifty-five Dollars ($155.00) per month. That with the intent to hinder, delay or defraud her creditors, said bankrupt, without consideration, on or about January 31, 1933 assigned, transferred and set over to her sons, Julius Lerner and Joseph P. Lerner, all the rentals then due or which might thereafter become due and owing from all the tenants of said property to Minnie Lerner.

II.

That on or about November 18, 1932 said bankrupt, Minnie Lerner, owned jointly with her husband the following described parcels of real estate:

1720 W. Atkinson Avenue, more particularly described as the East Two and Twenty-five hundredths feet (E. 2.25′) of the South Eighty-two and Eighty-eight hundredths feet (S. 82.88′) on East line of Lot Thirteen (13), all of Lot Fourteen (14) and the West Seven and Fifty hundredths (W. 7.50) feet of Lot Fifteen (15), Block Four (4), Connell's Subdivision, Milwaukee County, Wisconsin,

and on that date, with specific intent to hinder, delay or defraud her creditors, she transferred with her husband and removed or concealed all the above described real estate to a corporation known as Lerner Realty Company, formed at her instance, in return for One hundred seventy (170) shares of
the capital stock of said corporation, with the view of
14 placing the equities she held in this property beyond the
reach of her creditors, and with the specific intent of protecting her equity therein from the suit of hostile creditors. That on the same day said Minnie Lerner joined with her

husband in the transfer of certain other real estate to Lerner Realty Company with the specific intent to hinder, delay or defraud her creditors.

III.

That on or about June 4, 1929 Mayr Lerner and Minnie Lerner, his wife, purchased the following described property: Lots Sixteen (16) and Seventeen (17), Block Three (3) in Hanson & Milbrath's Subdivision No. 1 in the Southwest one-quarter (S.W. ¼) of Section Ten (10), Six (6), Twenty-two (22) in Milwaukee County, Wisconsin,
and that on or about August 19, 1931 Mayr Lerner and Minnie Lerner, his wife, deeded this property to her children, who gave Mayr Lerner and Minnie Lerner, his wife, a mortgage for the sum of Forty-five Hundred Dollars ($4500.00). That on or about November 3, 1932 said Mayr Lerner and Minnie Lerner, his wife, with intent to hinder, delay and defraud her creditors, released said mortgage to the mortgagees thereof, this objecting creditor is informed and believes, for the sum of Fifteen Hundred Dollars ($1500.00).

(Sgd) A. G. Casper,
Cashier of First Wisconsin National Bank of Milwaukee.

Subscribed, acknowledged and sworn to before me the day and year above mentioned, said subscriber being known to me to be the person described in and who signed and swore to above instrument.

S. M. Koller,
(Seal) *Notary Public, Milwaukee County, Wisconsin.*

My commission expires 9-23-1934.

Endorsed: "Filed Nov. 28, 1933, B. H. Westfahl, Clerk."

15 Dec. 15, 1933—BANKRUPT'S NOTICE OF MOTION TO STRIKE SPECIFICATIONS, filed as follows: Filed Dec. 1933.

• • (Caption) • •

Please Take Notice that Minnie Lerner, the bankrupt above named, will appear on the 16th day of December, 1933, at the opening of court, or as soon thereafter as counsel can be

heard, before the Honorable Ferdinand A. Geiger, Judge of the District Court of the United States for the Eastern District of Wisconsin, and will move to strike the specifications of objections filed in the above entitled matter for the reason that the same were not filed within the time limited by General Order No. 32 as amended by the Supreme Court of the United States on the 17th day of April, 1933, effective April 24, 1933.

Dated, this 13th day of December, 1933.

HERSH & MORSE,
Attorneys for Bankrupt, Minnie Lerner.

To Ben Z. Glass, Attorney for Jake Rakita and Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld.

To Wood, Warner & Tyrrell, Attorneys for First Wisconsin National Bank.

Endorsed: "Filed Dec. 15, 1933, B. H. Westfahl, Clerk."

16 And afterwards, to-wit: on the sixty-third day of said Term, to-wit: on the 16th day of December, 1933, the following proceedings were had, to-wit:

* * (Caption) * *

December 16, A. D. 1933.

Before Hon. F. A. Geiger, Judge.

This day came the parties by their counsel, Mr. Emil Hersh appearing for the bankrupt, and Messrs. Wood, Warner & Tyrrell and Ben Z. Glass appearing for creditors objecting to the discharge of the bankrupt. And this matter came on to be heard upon motion of said bankrupt to strike specifications of objections of the said objecting creditors; was argued and submitted, on consideration thereof,

It Is Ordered by the Court that said motion be and the same hereby is denied.

Endorsed: "Filed Dec. 16, 1933, B. H. Westfahl, Clerk."

17 Jan. 5, 1934—PRAECIPE, filed as follows: Filed Jan. 1934.

* * (Caption) * *

To: B. H. Westfahl, Clerk of the United States District Court for the Eastern District of Wisconsin.

Sir:

Please prepare and transmit to the United States Circuit Court of Appeals for the 7th Circuit the transcript of record and proceedings in the above entitled cause for use on appeal heretofore allowed herein and include in said transcript the following:

Bankrupt's petition for discharge.

Notice to Creditors.

Appearance in opposition to discharge in bankruptcy by First Wisconsin National Bank.

Appearance in opposition to discharge in bankruptcy by Jake Rakita and Sarah Rakita and Harry Blumenfeld and Dora Blumenfeld.

Order of United States District Court of November 28, 1933 granting objecting creditors time to file specifications of objections.

Specifications of Objections by First Wisconsin National Bank of Milwaukee, Wisconsin.

Specifications of Objections by Jake Rakita and Sarah Rakita and Harry Blumenfeld and Dora Blumenfeld.

Bankrupt's motion, notice of motion to dismiss specifications.

Order of United States District Court of December 16th, 1933, denying motion to strike specifications.

Praecipe.

Clerk's Certificate.

HERSH & MORSE,
Attorneys for Minnie Lerner, Bankrupt.

Endorsed: "Filed Jan. 5, 1934. B. H. Westfahl, Clerk."

18 CERTIFICATE OF CLERK.

United States of America
Eastern District of Wisconsin } ss.

I, B. H. Westfahl, Clerk of the District Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, which are copies, with their originals now on file and remaining of record in my office, and that they are true copies of the petition of the bankrupt to be discharged, order of December 16, 1933, denying motion of bankrupt to strike specifications of objections to the discharge of the bankrupt, and other papers and proceedings in the matter of Minnie Lerner, bankrupt.

In Testimony Whereof, I have hereunto set my hand, and duly affixed the seal of said Court at the City of Milwaukee, in said District, this 18th day of January in the year of Our Lord, one thousand nine hundred thirty-four, and of the Independence of the United States, the 158th.

B. H. WESTFAHL,
(Seal) *Clerk.*

Proceedings had and papers filed in the U. S. Circuit Court of Appeals:

19 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Minnie Lerner,
Bankrupt.

To the Honorable, the Judges of the Circuit Court of Appeals, for the Seventh Circuit of the United States:

Your petitioner, Minnie Lerner, respectfully represents that she is a resident of the City and County of Milwaukee, State of Wisconsin and was heretofore duly adjudicated bankrupt by the District Court of the United States for the Eastern District of Wisconsin, on the 22nd day of May, 1933; that thereafter, and on the 6th day of October, 1933, petitioner made application to the United States District Court for the Eastern District of Wisconsin, for a discharge in bankruptcy;

and that pursuant thereto, and on the 10th day of October, 1933, notice was given to all of the creditors of the above named bankrupt, that petitioner had filed her petition for discharge and that said notice further provided that the same would be heard before the United States District Court for the Eastern District of Wisconsin, at Milwaukee, in said district, on the 18th day of November, 1933 at 10 o'clock in the forenoon, and that all creditors could appear at said time and place and show cause why the same should not be granted; that thereafter, and on the 18th day of November, 1933, the First Wisconsin National Bank of Milwaukee, Wisconsin, and Jack Rakita and Sarah Rakita, his wife and Harry Blu-
20 menfeld and Dora Blumenfeld, his wife, by their respective attorneys, appeared before said court on the 18th day of November, 1933 and entered formal objection to the discharge in bankruptcy of your petitioner, and at the same time the court granted said objecting creditors ten days time in which to file their specifications; that thereafter, and on the 28th day of November, 1933, the said First Wisconsin National Bank, at Milwaukee, Wisconsin, and the said Jack Rakita and Sarah Rakita, his wife, and Harry Blumenfeld and Dora Blumenfeld, his wife, filed specifications of objections; that thereafter, and on the 13th day of December, 1933, petitioner, by her attorneys, caused to be served upon the attorneys for the objecting creditors, a Notice that petitioner would appear before the District Court for the Eastern District of Wisconsin, on the 16th day of December, 1933, and move to strike the specifications of objections filed in the above matter, for the reason that the same were not filed within the time limited by General Order XXXII as amended by the United States Supreme Court on the 17th day of April, 1933, effective on April 24, 1933; and that thereafter, and on the 16th day of December, 1933, your petitioner appeared by her attorneys at a hearing before the said District Court, and the said court, denying the motion of petitioner, caused an order to be entered denying said dismissal of said specifications, said order being entered on the 16th day of December, 1933.

That this petitioner, feeling herself aggrieved by the order of the United States District Court, for the Eastern District of Wisconsin, as entered on the 16th day of December, 1933, for the reason specified in the assignment of errors which is filed herewith, prays that her appeal be allowed and that citation issue as provided by law, and that a transcript of the

records, proceedings and papers upon which said order and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Seventh Circuit, under rules of such court in such cases made and provided.

21 Petitioner further prays that the proper order touching the security to be required of her to perfect her appeal, be made.

Dated at Milwaukee, Wisconsin, this 28th day of December, 1933.

MINNIE LERNER,
Petitioner.

State of Wisconsin }
Milwaukee County } ss.

MINNIE LERNER, being first duly sworn, according to law, deposes and says that she is the petitioner in the foregoing petition; that this appeal is not intended for delay, but that she verily believes that injustice has been done.

MINNIE LERNER.

Subscribed and sworn to before me this 28th day of December, 1933.

EMIL HERSH,
Notary Public, Milwaukee County, Wisconsin.

22 Endorsed: In the United States Circuit Court of Appeals For the Seventh Circuit. In the Matter of Minnie Lerner, Bankrupt. Petition for Appeal. Filed Jan. 4, 1934. Frederick G. Campbell, Clerk. Hersh & Morse Attorneys at Law 325-327 Century Building 808 North 3rd Street Milwaukee, Wis.

Jan. 4, 34.

23 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Minnie Lerner,
Bankrupt.

Now comes Minnie Lerner, the bankrupt in the above entitled matter and states that there is manifest error in the proceedings in this case, upon the application for discharge in

bankruptcy by petitioner and in the order entered by the United States District Court for the Eastern District of Wisconsin, herein, on the 16th day of December, 1933, and assigns as errors on appeal, that:

1. The United States District Court for the Eastern District of Wisconsin erred in granting the ten days time beyond the day creditors were required to show cause, in opposition to the petition for discharge within which objecting creditors could file specifications of objections.

2. The United States District Court for the Eastern District of Wisconsin, erred in not granting the bankrupt's motion to strike the specifications of objections filed by the objecting creditors for failure to file the same on the return day.

3. The United States District Court for the Eastern District of Wisconsin, erred in not following General Order XXXII of the bankruptcy act, as amended, effective on April 24, 1933 (11 U. S. C. A. Sec. 53).

24 Wherefore, petitioner prays that the aforesaid order, entered by the United States District Court for the Eastern District of Wisconsin, on December 16th, 1933, denying the bankrupt's petition to strike the specifications filed by the objecting creditors be reversed and that the said District Court for the Eastern District of Wisconsin, be directed to vacate said order entered on the 16th day of December, 1933, and be required and directed to enter an order striking the specifications of objections and that the petition for discharge be granted to petitioner.

Dated, at Milwaukee, Wisconsin, this 28th day of December, 1933.

MINNIE LERNER,
Petitioner.

25 Endorsed: In the United States Circuit Court of Appeals For the Seventh Circuit. In the Matter of Minnie Lerner, Bankrupt. Assignment of Errors. Filed Jan. 4, 1934. Frederick G. Campbell, Clerk. Hersh & Morse Attorneys at Law 325-327 Century Building 808 North 3rd Street Milwaukee, Wis.

Filed Jan. 4, 1934. 26 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Thursday, January 4, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

In the Matter of Minnie Lerner, Bankrupt.

Minnie Lerner
5128 *vs.*
First Wisconsin National Bank of Milwaukee, Wis., *et al.*

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

On motion of Minnie Lerner, Bankrupt, in the above entitled matter,

It Is Hereby Ordered, that an appeal to the United States Circuit Court of Appeals, for the Seventh Circuit, from the order heretofore entered by the District Court of the United States for the Eastern District of Wisconsin, on the 16th day of December, 1933, denying the Bankrupt's motion to strike the specifications of objections filed by the First Wisconsin National Bank, at Milwaukee, Wisconsin, Jack Rakita and Sarah Rakita, his wife, and Harry Blumenfeld and Dora Blumenfeld, his wife, the objecting creditors, be and the same is hereby allowed, and that a transcript of the record, proceedings, and documents had therein duly authenticated, be forthwith transmitted to the United States Circuit Court of Appeals, for the Seventh Circuit.

It is further ordered, that the bond on appeal be fixed in the sum of $250.00.

27 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Minnie Lerner,
Bankrupt.

To: First Wisconsin National Bank, of Milwaukee, Wisconsin, Jake Rakita and Sarah Rakita, his wife and Harry Blumenfeld and Dora Blumenfeld, his wife.

You Are Hereby Notified that in that certain matter in the United States District Court in and for the Eastern District of Wisconsin, in the matter of Minnie Lerner, Bankrupt, wherein the District Court denied the Bankrupt's motion to strike specifications of objections to her discharge in bankruptcy, filed by the First Wisconsin National Bank, Jake Rakita and Sarah Rakita, his wife, and Harry Blumenfeld and Dora Blumenfeld, his wife, an appeal has been allowed to the said Minnie Lerner, Bankrupt, to the United States Circuit Court of Appeals for the Seventh Circuit.

You Are Hereby Cited and Admonished to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit to be holden at the City of Chicago, thirty days after the date of the citation, to-wit, on the 3rd day of February, 1934, and to show cause, if any there be, why the order entered therein and appealed from as in the order allowing said appeal set forth, should not be corrected and speedy justice done the parties in their behalf.

Witnesseth, the Hon. William M. Sparks, Judge of the United States Circuit Court of Appeals for the Seventh Circuit, this 4th day of January, 1934.

WILLIAM M. SPARKS,
Judge Circuit Court of Appeals.

28 Endorsed: 5128 In the United States Circuit Court of Appeals For the Seventh Circuit. In the Matter of Minnie Lerner, Bankrupt. Citation. Filed Jan. 6, 1934. Frederick G. Campbell, Clerk. Hersh & Morse Attorneys at Law 325-327 Century Building 808 North 3rd Street Milwaukee, Wis. Received Copy Jan. 5, 1933, Wood, Warner & Tyrrell, Attorneys for First Wisconsin National Bank of Milwaukee, Wis. Received Copy January 5, 1934, Ben Z. Glass, Per L. Neururer, Atty. for Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 19, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the fifth day of February, 1934, and used and considered at the hearing and on the determination of the following entitled cause:

In the Matter of Minnie Lerner, Bankrupt;

Minnie Lerner,

Appellant,

vs.

First Wisconsin National Bank of Milwaukee, Wisconsin, Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld,

Appellees,

No. 5128, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 27th day of June, A. D. 1934.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit on the third day of October, 1933, of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-Three and of our Independence the One Hundred and Fifty-Eighth.

In the Matter of Minnie Lerner, Bankrupt;

Minnie Lerner
5128 *vs.*
First Wisconsin National Bank of Milwaukee, *et al.*

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

And on, to-wit: On the fourth day of January, 1934, there was filed in the office of the Clerk of this court a Petition for Leave to Appeal, which said Petition for Leave to Appeal is not copied here, as the same appears on pages 14 to 16, inclusive, of the printed record in this cause, certified herewith.

And on the same day, to-wit: On the fourth day of January, 1934, there was filed in the office of the Clerk of this court an Assignment of Errors, which said Assignment of Errors is not copied here, as the same appears on pages 16 and 17 of the printed record in this cause, certified herewith.

And on the same day, to-wit: On the fourth day of January, 1934, there was filed in the office of the Clerk of this court an order allowing appeal was entered, which said order allowing appeal is not copied here, as the same appears on page 18 of the printed record in this cause, certified herewith.

And on the same day, to-wit: On the fourth day of January, 1934, there was filed in the office of the Clerk of this court an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5128. October Term, 1933.

In the Matter of Minnie Lerner, Bankrupt;

Minnie Lerner,

Appellant,

vs.

First Wisconsin National Bank of Milwaukee, *et al.*,

Appellees.

The Clerk will enter my appearance as counsel for the appellant.

EMIL HERSH and HERBERT MORSE,
327 Century Building,
Milwaukee, Wis.

Endorsed: Filed January 4, 1934, Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the sixth day of January, 1934, there was filed in the office of the Clerk of this court a Citation, which said Citation is not copied here, as the same appears on page 19 of the printed record in this cause, certified herewith.

And afterwards, to-wit: On the ninth day of January, 1934, there was filed in the office of the Clerk of this court the Bond on Appeal, which said Bond on Appeal is not copied here, as it is set out in full in the order approving bond, immediately following.

And on the same day, to-wit: On the ninth day of January, 1934, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 9, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.

In the Matter of Minnie Lerner, Bankrupt.

Minnie Lerner
5128 *vs.*
First Wisconsin National Bank of Milwaukee, *et al.*

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Now this day comes the appellant and presents her appeal bond, pursuant to the order of this court entered January 4, 1934, which said appeal bond is in the words and figures following, to-wit:

Know All Men By These Presents, that Minnie Lerner, as principal, and The Aetna Casualty and Surety Company, as surety, are held and firmly bound unto the First Wisconsin National Bank, of Milwaukee, Wisconsin, Jake Rakita and Sarah Rakita, his wife, and Harry Blumenfeld and Dora Blumenfeld, his wife, in the full and just sum of Two Hundred and Fifty and no/100 ($250.00) Dollars, to be paid to the said First Wisconsin National Bank, Jake Rakita and Sarah Rakita and Harry Blumenfeld and Dora Blumenfeld, and to which payment, well and truly made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents, sealed with our seals and dated this 5th day of January, 1934.

Whereas, at a regular term of the District Court of the United States for the Eastern District of Wisconsin, sitting at Milwaukee in said district, in the matter of Minnie Lerner, Bankrupt, wherein the said Minnie Lerner filed a motion to strike specifications of objections filed by the First Wisconsin National Bank of Milwaukee, Wisconsin, Jake Rakita and Sarah Rakita, his wife and Harry Blumenfeld and Dora Blumenfeld, his wife, to the petition for discharge in bank-

ruptcy and an order was entered on the 16th day of December, 1933, dismissing the motion to strike said specifications, and the said Minnie Lerner has taken an appeal from said order to the United States Circuit Court of Appeals in such case to reverse the order of the court in said matter and a citation having been issued herein directed to the First Wisconsin National Bank, of Milwaukee, Wisconsin, Jack Rakita and Sarah Rakita, his wife, and Harry Blumenfeld and Dora Blumenfeld, his wife, citing that they be and appear before the United States Circuit Court of Appeals for the Seventh Circuit to be holden at the City of Chicago, in the State of Illinois, according to law, within thirty days from the date of such citation.

Now, Therefore, the condition of such obligation is such that if the said Minnie Lerner shall prosecute her appeal to effect and answer all damages and costs, if she shall fail to make her plea good, then the above obligation to be void; otherwise to remain in full force and effect.

Dated at Milwaukee, Wisconsin, this 5th day of January, 1934.

MINNIE LERNER,
Principal.

THE AETNA CASUALTY AND SURETY COMPANY (SEAL)
By: A. J. GODDARD,
Surety,
Attorney-in-fact.

Countersigned
C. D. SULLIVAN,
Resident Agent.

The above bond is approved both as to form and sufficiency and in all other respects, this 9th day of January, 1934.

SAMUEL ALSCHULER,
Judge Circuit Court of Appeals.

It is now here ordered that the foregoing bond be, and the same is hereby approved.

And afterwards, to-wit: On the twenty-second day of January, 1934, there was filed in the office of the Clerk of this court an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5128. October Term, 1933.

In the Matter of Minnie Lerner, Bankrupt;

Minnie Lerner,

Appellant,

vs.

First Wisconsin National Bank of Wisconsin, *et al.*,

Appellees.

The Clerk will enter my appearance as counsel for the appellee.

JOHN C. WARNER,
213 West Wisconsin Ave.,
Milwaukee, Wisconsin.

Endorsed: Filed January 22, 1934, Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the third day of February, 1934, there was filed in the office of the Clerk of this court an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5128. October Term, 1933.

In the Matter of Minnie Lerner, Bankrupt;

Minnie Lerner

vs.

First Wisconsin National Bank of Milwaukee, *et al.*

The Clerk will enter my appearance as counsel for the appellee.

BEN Z. GLASS,
152 W. Wisconsin Ave.,
Milwaukee, Wisconsin.

Endorsed: Filed February 3, 1934, Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the ninth day of February, 1934, there was filed in the office of the Clerk of this court a notice and motion to dismiss appeal, which said notice and motion are in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Minnie Lerner,
Bankrupt. } Case #5128

NOTICE OF MOTION TO DISMISS APPEAL.

To: Hersh & Morse,
Counsel for Appellant.

Please Take Notice that upon the pleadings, papers and proceedings in this cause in the District Court of the United States for the Eastern District of Wisconsin, and upon the record and proceedings returned to this court by the Clerk of

the said District Court on the appeal by the bankrupt to this court, the First Wisconsin National Bank of Milwaukee, one of the Appellees in the above cause will move this court at the courtroom in the Federal Building in the City of Chicago, State of Illinois, for an order dismissing the appeal in the above entitled cause upon the grounds more fully set forth in said motion to dismiss, a copy of which motion is hereto annexed and herewith served upon you, and for such other relief as to the court may seem fit and proper.

Such motion will be submitted to the United States Circuit Court of Appeals for the Seventh Circuit on Tuesday, February 13, 1934, at 9:30 o'clock A. M.

Dated February 8, 1934.

JOHN C. WARNER,
Counsel for First Wisconsin National Bank of Milwaukee, one of the Appellees.

Due service of the within Notice and Motion is hereby admitted this ..... day of February, 1934.

.....
Counsel for Appellant.

Received Feb. 8, 1934.

HERSH & MORSE,
Attorneys for Minnie Lerner, Bankrupt.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Minnie Lerner,
Bankrupt. } Case #5128

MOTION TO DISMISS APPEAL.

Comes now the First Wisconsin National Bank of Milwaukee, one of the Appellees herein, by John C. Warner, its Counsel, and moves this court to dismiss with costs the appeal taken herein to this court by Minnie Lerner, Bankrupt, upon the following grounds:

1. The appeal is premature.
2. The order appealed from is not final, and is an order preceding a final decision.

3. The Appellate Court has no jurisdiction as an appellate court to hear and determine said appeal.

Dated February 8, 1934.

JOHN C. WARNER,
Counsel for First Wisconsin National Bank of Milwaukee, one of the Appellees.

Endorsed: Filed Feb. 9, 1934, Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the thirteenth day of February, 1934, there was filed in the office of the Clerk of this court a notice and motion to dismiss appeal, and affidavit of Ben Z. Glass, which said notice, motion to dismiss appeal and affidavit, are in the words in figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Minnie Lerner,
Bankrupt. } Case #5128

NOTICE OF MOTION TO DISMISS APPEAL.

To: Hersh & Morse,
Counsel for Appellant.

Please Take Notice that upon the pleadings, papers and proceedings in this cause in the District Court of the United States for the Eastern District of Wisconsin, and upon the records and proceedings returned to this court by the Clerk of the said District Court on the appeal by the bankrupt to this court, and upon the affidavit of Ben Z. Glass, counsel for several appellees, Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld, several of the Appellees in the above cause will move this court at the courtroom in the Federal Building in the City of Chicago, State of Illinois, for an order dismissing the appeal in the above entitled cause upon the grounds more fully set forth in said motion to dismiss, a copy of which motion and affidavit is hereto annexed and herewith served upon you, and for such other relief as to the court may seem fit and proper.

Such motion will be submitted to the United States Circuit Court of Appeals for the Seventh Circuit on Tuesday, February 13, 1934, at 9:30 o'clock A. M.

Dated February 8, 1934.

BEN Z. GLASS,
Counsel for Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld.

Due service of the within notice, motion and affidavit is hereby admitted this ..... day of February, 1934.

.....
Counsel for Appellant.

Received Feb. 8, 1934.

HERSH & MORSE,
Attorneys for Appellant.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Minnie Lerner,
Bankrupt. } Case #5128

MOTION TO DISMISS APPEAL.

Come now Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld, several of the Appellees herein, by Ben Z. Glass, their Counsel, and move this court to dismiss with costs the appeal taken herein to this court by Minnie Lerner, Bankrupt, upon the following grounds:

1. The appeal is premature.
2. The order appealed from is not final, and is an order preceding a final decision.
3. The Appellate Court has no jurisdiction as an appellate court to hear and determine said appeal.

Dated February 8, 1934.

BEN Z. GLASS,
Counsel for Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld, several of the Appellees.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Minnie Lerner,
Bankrupt. } Case #5128

AFFIDAVIT.

State of Wisconsin
Milwaukee County } ss.

BEN Z. GLASS, being first duly sworn, on oath deposes and says:

1. That he is the attorney for Appellees Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld in the above entitled matter.

2. That on November 18, 1933 a hearing on the petition for discharge of the above named bankrupt came on to be heard before the District Court of the United States for the Eastern District of Wisconsin.

3. That the bankrupt did not appear at said hearing and no one appeared on behalf of said bankrupt at said hearing.

4. That the court thereupon, on verbal motion of Ben Z. Glass, entered an order granting objecting creditors ten days' time to file specifications of objections to the discharge of said bankrupt.

5. That on November 28, 1933, specifications of objections to the discharge of said bankrupt were duly filed by Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld within the time limited by said order.

BEN Z. GLASS.

Subscribed and sworn to before me this 8th day of February, 1934.

LUCILLE C. NEURURER,
(Notarial Seal) *Notary Public, Milwaukee Co., Wis.*

My commission expires Jan. 31, 1937.

Endorsed: Filed Feb. 13, 1934, Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the thirteenth day of February, 1934, the following further proceedings were had and entered of record, to-wit:

Tuesday, February 13, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

In the Matter of Minnie Lerner, Bankrupt;

Minnie Lerner
5128 *vs.*
First Wisconsin National Bank of Milwaukee, Wisconsin, *et al.*

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Now this day come the parties by their counsel and counsel for appellee present a motion to dismiss this appeal, and the court having heard the oral argument by Mr. John C. Warner, counsel for appellee, in support of said motion, and by Mr. Emil Hersh, counsel for appellant, in opposition thereto, It is ordered that counsel for appellee file a typewritten brief on the question of the right of the District Court to extend time for filing specifications within 5 days from this date; and that counsel for appellant file a typewritten reply thereto within 5 days after the filing of the brief for appellee.

And afterwards, to-wit: On the eighth day of May, 1934, there was filed in the office of the Clerk of this court the opinion of the court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5128. October Term, 1933, April Session, 1934.

IN THE MATTER OF MINNIE LERNER, Bankrupt.

MINNIE LERNER, *Appellant,*

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, WISCONSIN, JAKE RAKITA, SARAH RAKITA, HARRY BLUMENFELD and DORA BLUMENFELD, *Appellees.*

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

May 8, 1934.

Before EVANS and SPARKS, *Circuit Judges.*

Per Curiam. Minnie Lerner was adjudged a bankrupt on the 22nd day of May, 1933, and on the 6th day of October, 1933, made application for a discharge of debts. On October 10, 1933, notice was given to creditors that the petition for discharge had been filed and would be heard by the District Court on November 18, 1933. On the latter date, appellees appeared by counsel and entered formal objections and requested leave of court, which was granted, for an extension of time to November 28, 1933, within which to file specification of objections. No objections were interposed by bankrupt to the order extending the time. The creditors filed specifications of objections on November 28, 1933, and bankrupt moved to strike them because they were not filed in time. The court denied bankrupt's motion. This court granted appellant leave to appeal pursuant to section 24-B of the Bankruptcy Act.

General Order No. 32 before the 1933 amendment read as follows:

"A creditor opposing the application of a bankrupt for

his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge."

On April 17, 1933, this order, No. 32, was amended, and now reads:

"A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall at the same time file a specification in writing of the grounds of his opposition."

Appellant contends the amended order was intended to, and does, deny to the court the right to extend the time for filing of specifications of objections.

Prior to the amendment it was quite generally held that the court could enlarge the time for the filing of specifications.* These holdings are predicated on the assumption that the objections and specifications are pleadings, and the time within which they may be filed are matters within the discretion of the District Court. Unless the amended order takes from the court all power to allow amendments to pleadings or denies to it the right to grant extensions of time within which to file such pleadings, the contention of appellant can not be sustained. Two cases have been cited by appellant which hold that the amended order No. 32 has this effect. (*Matter of Harley M. Hodges,* 4 F. Supp. 804; *Matter of Cornelius J. Corcoran,* 4 F. Supp. 988.)

We are not persuaded that the amended order was intended to so restrict or limit the court who is, of necessity, in the best possible position to determine whether extensions of time should be granted or whether pleadings should be amended.

The order does fix the time within which objections shall be filed. Specifications are merely elaborations of the objections. The order does not, however, prescribe procedure in case objections are made within the designated time.

Objections, we take it, may be made orally in open court.

* *In re Rerat,* 14 F. (2d) 607; *Schlesinger* v. *Phillips,* 36 F. (2d) 191; *In re Nathanson,* 152 Fed. 585; *In re Brecher,* 4 F. (2d) 1001.

Having been thus made, they should be reduced to writing and filed on the same day, that is, the return day. They must likewise be accompanied by or followed by specifications. Nevertheless, when good cause is shown, why should the specifications not be filed at a later date? In the instant case, the bankrupt's counsel and objectors' attorney were both in court on the return day. The latter made their objections and asked for a short time within which to file the specifications. Bankrupt's counsel did not object. The specifications were filed on the date fixed by the order of the court, and the bankrupt's attorneys moved to strike them. Had bankrupt's counsel objected on the return day, attorneys for creditors could and would have filed their objections on that same day. To permit bankrupt to take advantage of an order entered on her apparent acquiescence would be intolerable.

The court of bankruptcy is a court of equity. The Bankruptcy Act is administered by such a court. Statutes, rules, and decisions alike, require, of necessity, short periods of time within which parties may file pleadings and take appeals. There is good reason back of the rules which expedite matters in bankruptcies, for otherwise delays would defeat the most effective administration of the bankrupt estate. The requirement for the filing of objections promptly is a salutary one, and should not be defeated by inexcusable action of one litigant. But it is unfair to assume that a court confronted by a request for time within which to file specifications of objections would violate the spirit of the act which stresses promptness in disposing of matters arising in the administration of the act. We can not believe that the order was intended to take away from the District Court all discretion in matters that are primarily those of pleading. Nor was it intended to permit one to acquiesce in request of counsel, and action of court thereon, to repudiate the necessary consequences of such acquiescence.

The order is

AFFIRMED.

And on the same day, to-wit: On the eighth day of May, 1934, the following further proceedings were had and entered of record, to-wit:

Tuesday, May 8, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

In the Matter of Minnie Lerner, Bankrupt;

Minnie Lerner
5128 *vs.*
First Wisconsin National Bank of Milwaukee, Wisconsin, Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this court that the order or decree of the said District Court in this cause appealed from be, and the same is hereby affirmed with costs.

And afterwards, to-wit: On the twenty-eighth day of May, 1934, there was filed in the office of the Clerk of this court a petition for rehearing, which said petition for rehearing is not copied here.

And afterwards, to-wit: On the seventh day of June, 1934, there were filed in the office of the Clerk of this court two answers to the petition for rehearing, which said answers to the petition for rehearing are not copied here.

And afterwards, to-wit: On the nineteenth day of June, 1934, the following further proceedings were had and entered of record, to-wit:

Tuesday, June 19, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

In the Matter of Minnie Lerner, Bankrupt;

Minnie Lerner
5128 *vs.*
First Wisconsin National Bank of Milwaukee, Wisconsin, Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby denied.

And on the same day, to-wit: On the nineteenth day of June, 1934, the following further proceedings were had and entered of record, to-wit:

Before:

Hon. Evan A. Evans, Circuit Judge.

On motion of counsel for appellant, it is now here ordered that the mandate in this cause be, and the same is hereby stayed for 90 days.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 23 to 38, inclusive, contain a true copy of the proceedings had and papers filed (excepting briefs of counsel, petition for rehearing and answers thereto),

In the Matter of Minnie Lerner, Bankrupt;

Minnie Lerner,

Appellant,

vs.

First Wisconsin National Bank of Milwaukee, Wisconsin, Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld,

Appellees,

No. 5128, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 27th day of June, A. D. 1934.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[fol. 40] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

October Term, A. D. 1933.

No. .....

In the Matter of MINNIE LERNER, Bankrupt.

MINNIE LERNER,

Petitioner,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, WISCONSIN, JAKE RAKITA, SARAH RAKITA, HARRY BLUMENFELD and DORA BLUMENFELD,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLES, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully submits her petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Seventh Circuit in the above case.

Summary Statement of Matter Involved.

The petitioner, Minnie Lerner, was adjudicated a bankrupt on May 22, 1933, and on October 6, 1933, made appli-

cation for a discharge in bankruptcy. On October 10, 1933, notice was given creditors setting November 18, 1933, as the day when creditors might show cause against the discharge (R. 2). On November 17, 1933, respondent, First Wisconsin National Bank of Milwaukee, Wisconsin, filed a notice of appearance in opposition, and a written request to the court to extend the time within which to file specifications to November 28, 1933. On November 18, 1933, respondent, Jake Rakita, et al, filed a notice of appearance in opposition (R. 3).

On November 28, 1933, an order granting creditors time to file specifications was filed (R. 4), and on that date the written specifications of objection to discharge were filed by respondents (R. 4 and R. 9). On December 15, 1933, bankrupt moved to strike the specifications because the same had not been filed within the time limited by General Order 32 (11 U. S. C. A. §53), as amended April 17, 1933 (R. 11), which motion was denied by the District Court (R. 12) on December 16th.

An appeal from the order denying this motion was allowed by the Circuit Court of Appeals on January 4, 1934 (R. 18). Respondents moved to dismiss the appeal (R. 29 and 31), which motions were not granted, the matter being considered on the merits (Decision R. 34), and the District Court's order denying bankrupt's motion to strike the specifications was affirmed by the Circuit Court of Appeals (R. 37). A petition for rehearing was denied June 19, 1934, and a stay of the mandate granted (R. 38).

The bankrupt's motion to strike the specifications was based upon the theory that the District Court had neither authority nor discretion to extend the time within which specifications were to be filed, beyond the date creditors were required to show cause in opposition to the discharge, and that the appearance in opposition and the specifica-

tions were required to be filed on that date and concurrently.

The Circuit Court of Appeals stated, that it was not persuaded that General Order 32 (11 U. S. C. A. §53), as amended, was intended to deprive the court of the power to extend the time for filing specifications and held in result that the District Court might exercise such right of extension in its discretion (R. 34).

The Circuit Court further held that inasmuch as bankrupt's counsel was in District Court on the day creditors were required to show cause upon the application for discharge, and did not object to the extension of time, that bankrupt therefore acquiesced therein. There is nothing in the record to suggest, nor is it a fact that either bankrupt or counsel, or anyone for her were present. This is further indicated by affidavit of one of respondent's attorneys (R. 32), and was pointed out to the Circuit Court on the motion for rehearing, without effecting any change in its original decision.

Questions Presented.

1. Under General Order 32 (11 U. S. C. A. §53), as amended, has the District Court authority to extend the time for the filing of specifications of objections beyond the time of appearance in opposition, and beyond the date set for showing cause against a discharge in bankruptcy?

2. Does the failure of bankrupt to be present or represented on the day when the creditors are required to show cause in opposition to an application for discharge constitute such acquiescence, as a matter of law, as to estop her from challenging the District Court's authority to extend the time to file specifications?

Reasons Relied on for Allowance of the Writ.

1. The Circuit Court of Appeals has decided an important question of bankruptcy procedure which has not, but should be settled by this court.

The primary question presented involves the construction to be given to General Order 32, (11 U. S. C. A. §53), as amended. The procurement of a discharge in bankruptcy is an essential part of the proceedings. This, together with the large number of such proceedings, as well as the effect of a discharge on both debtor and creditor, particularly during these times of economic stress, together with the avoidance of abuses presumably contemplated by the amendment and the benefits sought thereby, all emphasize the importance of the questions presented, and of having an authoritative decision of this court as to the correct construction to be given Order 32, as amended.

The Circuit Court of Appeals has given practically no effect to this amendment. Undoubtedly this court considered the object to be attained by the amendment important enough to warrant the making thereof; equally important, therefore, is its correct application. This may further be inferred from the fact that notwithstanding the various amendments to the Bankruptcy Act, the regulations relative to the subject covered by the amendment had not been materially changed for some sixty (60) years prior to the instant amendment.

2. There already exists considerable uncertainty as to the construction to be placed upon the amendment.

In addition to the Circuit Court's decision here, three[1] District Judges have passed upon the construction to be

[1] **Matter of Harley M. Hodges,** 4 F. Supp. 804 Aff. 70 Fed. (2nd) 243.

Matter of Cornelius J. Corcoran, 4 F. Supp. 988.

In re Gorman, D. C. Western District of South Carolina. No official reporter citation available; found under Sec. 3072 Bankruptcy Law Service of Commerce Clearing House, Inc.

given to Order 32, as amended. One has held that the amendment deprives the court of the board discretion to extend the time for filing specifications, indicating his uncertainty as to the limits of such restriction; the other two held that such amendment leaves the court wholly without authority or discretion to grant an extension. A leading text writer[2] gives no important practical effect to the amendment. A publication[3] having wide distribution among attorneys interested in bankruptcy matters has stressed, as an important change, the requirement that specifications must be filed on the day creditors are required to show cause.

In the short time since the amendment became effective there has already developed the beginning of a division of opinion and uncertainty as to the effect to be given thereto. The costs and delays of litigation in the lower Federal Courts to determine the questions presented, as well as the possible failure to accomplish the object which this court had in making the amendment, can all be avoided by this court granting the writ and passing upon the matter.

3. The Circuit Court has decided an important question of general law in a way probably untenable and apparently in conflict with an applicable decision of this court.

The Circuit Court failed on motion for re-hearing to change the statements of fact relative to the bankrupt's appearance at the time of the hearing notwithstanding that the record clearly shows she was not present or represented. Taking it for granted that the Circuit Court would not be satisfied to decide the case on erroneous facts, the only conclusion is that the correct facts as called to the Circuit Court's attention on rehearing were deemed to support the Circuit Court's conclusion as originally made. The

[2] Remington on Bankruptcy, 4th Ed. Sec. 3201.

[3] American Bankruptcy Review, May, 1933. Vol. IX, Page 279.

decision would therefore rest upon the basis that the absence of the bankrupt on the day creditors are required to show cause in opposition constituted such acquiescence to the order extending time as to prevent the bankrupt from questioning the same by appeal. The Circuit Court's rule as to acquiescence arising from such absence appears to be contrary to the rule applicable thereto. As stated by this court in *Pence vs. Langdon,* 99 U. S. 578, at 581 (italics ours):

> "Acquiescence and waiver are always questions of fact. There can be neither without *knowledge.* The terms import this foundation for such action. *One cannot waive or acquiesce in a wrong, while ignorant that it has been committed.* Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action."

Neither the bankrupt's absence, nor her alleged failure to object, as erroneously found by the Circuit Court, furnishes any basis for assuming she had knowledge of facts from which her acquiescence to the order here made might be inferred. The Court's conclusion as to the bankrupt's acquiescence, with the resulting penalty of the loss of bankrupt's right to question by appeal the propriety of the order made, we submit is untenable. This should not be permitted to stand as being a proper declaration of the law on the subjects involved.

WHEREFORE, your petitioner respectfully prays that a writ of Certiorari issue under the seal of this court, to review the decree of the Circuit Court of Appeals of the Seventh Circuit in the above case, and that said decree be reversed.

EMIL HERSH,
Attorney for Petitioner

In the Supreme Court of the United States

October Term, A. D. 1933.

No. .....

In the Matter of MINNIE LERNER, Bankrupt.

MINNIE LERNER,

Petitioner,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, WISCONSIN, JAKE RAKITA, SARAH RAKITA, HARRY BLUMENFELD and DORA BLUMENFELD,

Respondents.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

There was no opinion in the District Court.

The opinion of the Circuit Court of Appeals (R. 34-36) is reported in 70 Fed. (2d) 938.

Jurisdiction.

The decree of the Circuit Court of Appeals sought to be reviewed was entered on May 8, 1934 (R. 37). The

order denying the petition for rehearing was made June 19th, 1934 (R. 38), and a stay of the mandate granted on that day.

The jurisdiction of this court is invoked under Section 240-a of the Judicial Code as amended by the Act of February 13th, 1925.

Statement of Facts.

The facts have been stated in the petition.

Specifications of Errors.

It is submitted that the Court below erred:

1. In holding that General Order 32 as amended left the District Court any discretion to extend time to file specifications.

2. In holding that the bankrupt's absence or failure to object on the show cause date of hearing for discharge constituted such acquiescence as to preclude her from questioning on appeal the propriety of the order extending the time.

3. In affirming the District Court's order denying the bankrupt's motion to strike the specifications.

Summary of Argument.

The court based its decision in part on its general power to extend time for pleadings, instead of arriving at a construction of Order 32 (11 U. S. C. A. §53), as amended, with the aid of applicable rules of construction, Post P. 11

By applying prior decisions to the amended order the court has begged the question whether under a proper construction of the order as amended, such decisions are applicable. No statement is made as to why applicable rules of construction are neither mentioned nor followed. P. 12.

Two changes in Order 32, as amended, appear from the substitution of the provision for appearance and filing of specifications of opposition at the same time on the return day of the notice to show cause against a discharge instead of within the previous ten-day period formerly provided and from the omission of the provision for shortening or enlargement of time. No effect of any consequence to either change is given, yet an intention to make a change is strongly indicated by the change in the language of the order. P. 13.

The words of Order 32 as amended, "at the same time," are unambiguous and effect should be given to their plain import. P. 14.

Effect to each word should be given if possible, which rule is disregarded by the court below. In so doing it arrives at the apparently impossible result of construing, in effect, the words "at the same time" to mean *different* times. Not only are the appearance and filing specifications to be concurrent but the time is definitely fixed as the day when creditors must appear to show cause. P. 15.

The court has also disregarded the elimination in Order 32, as amended, of the provision contained in the order before amendment for the shortening or enlargement of time. Notwithstanding a number of amendments to the general orders this provision was retained until the instant amendment. The deliberate elimination of such provision indicates an intention to deprive the bankruptcy court of its former power to extend the time for filing specifications. To hold otherwise would be to put back by construction the very words eliminated by the amendment. The omission must be assumed to be intentional for similar provi-

sions were inserted or retained in other general orders. P. 16.

The court below, in stating that bankrupt was present and failed to object to the order extending time, has based its decision in a large measure upon a fact demonstratably erroneous on the record. Knowledge of the fact of the entry of the order extending time, and that it was error to do so, are prerequisite to the conclusion that bankrupt acquiesced in the order. P. 18.

The error here occurred without any fact of bankrupt to mislead or influence court or counsel, but was of their own making. P. 19.

Even knowledge of the essential facts should not extend the duty of bankrupt to the point of requiring her to guard her adversaries from committing error. The court's holding that bankrupt's absence or failure to object constituted acquiescence to the order, is not properly declarative of the law. P. 20.

Bankrupt was not required to be present on the return day, and in any case for such reason to deprive her of the right to question the order by appeal, is an unjustified penalty. P. 22.

ARGUMENT.

POINT I.

The court should not have held that General Order 32, as amended, left the court any discretion to extend the time to file specifications of objection to the bankrupt's discharge.

Inasmuch as amended Order 32 was promulgated by the Supreme Court, it would seem superfluous to argue the rules of construction which should be followed by the Court in construing its own order, except that the disregard of such rules form the basis of petitioner's specifications of errors.

General Order No. 32 (11 U. S. C. A. §53) before the 1933 amendment read as follows:

> "A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge."

On April 17, 1933, this order, No. 32, was amended and now reads:

> "A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall at the same time file

a specification in writing of the grounds of his opposition."

The opinion of the court below is to the effect that inasmuch as the court may in its discretion extend the time for pleadings, and inasmuch as specifications are pleadings, therefore the time to file may be extended. If the statement were that the court in *every case* had such discretion, then it would follow as a matter of logic. As a matter of fact, however, there are various limitations on courts which restrict their general powers such as those relating to pleadings and extensions of time. For example, there are limitations on the time for appeal; limitations of the time within which creditors may file claims; limitations within which petitions for discharge may be filed; limitations within which petitions to revoke a discharge may be filed. The question here is whether Order 32 as amended has become one of the class of orders limiting the powers of the court. The answer depends not upon the general rule relating to the discretion of the court as to pleadings and extensions, but upon the construction which is to be placed upon this Order 32 upon application of established rules of construction.

In connection with the general powers of the court it will be noted that General Order 37 (11 U. S. C. A. §53) has been held not to be applicable to bankruptcy proceedings. *International Harvester Co. vs. Carlsen,* (C. C. A. 8th) 217 Fed 736 at 739. *Brookstone Manufacturing Co.,* (C. C. A. 1st) 239 Fed. 697 at 699.

Decisions prior to the amendment, as mentioned by the court, which hold that the court could enlarge the time for filing specifications must be read in light of the fact that Order 32, prior to amendment specifically provided that

ten days after appearance would be allowed for filing specifications "unless the time shall be shortened or enlarged by special order of the judge." That clause has now been omitted, and accordingly to apply prior decisions is to beg the question whether such decisions are now applicable notwithstanding the changes in the order.

General orders in bankruptcy are to be regarded as the act itself from which it would follow that the same rules for construing an act should be applied in construing the General Orders. That the General Orders are to be regarded as is the statute itself, is held in the *Matter of Brecher,* 4 Fed. (2d) 1001. They have the same force as a provision of the statute. *Wilkenson vs. Waters,* 292 Fed. 395, and cases there cited. None of the rules of construction available are applied or discussed in the opinion; no reason stated why they do not apply; no statement made as to what rules of construction were followed.

There are two distinct changes in Order 32 as amended, compared with this order prior to amendment. First, the amended order states that creditors shall file specifications *at the same time* as the appearance in opposition, upon the day creditors are to show cause, instead of within ten days thereafter, as provided in the Order prior to amendment; second, the provision "unless the time shall be shortened or enlarged by special order of the Judge" contained in previous orders has been omitted entirely in the amendment.

The effect which the Circuit Court of Appeals gives to these changes is not clear. That changes were intended must be inferred from the changes in language made by the amendment. As stated in *Crawford vs. Burke,* 195 U. S. 176, at 190:

"Our own view, however, is that a change in phraseology creates a presumption of a change in intent."

In *Louisville & Nashville Railroad Co. vs. Mottley,* 219 U. S. 467 at 475, in respect to the change in the act there considered, the court says:

"We cannot suppose that this change was without a distinct purpose on the part of Congress."

To apply the language of 25 *R. C. L.* at 1051, to the instant order, rather than to an act of the legislature as there dealth with, the Supreme Court must be presumed to have known both the language employed in former orders, and the judicial construction placed upon them; if in the amended order on the same subject, it uses different language in the same connection, the courts must presume that a change of the law was intended. The court below has stated its opinion of what the amendment did not do. However, it has not indicated what it thought the Supreme Court intended by amending the order notwithstanding that upon the foregoing rules the first presumption to be made is that a change in effect was intended by the change in language.

Where the statute is plain and unambiguous in its terms, the courts must enforce the law as they find it. *Pirie vs. Chicago Title & Trust Co.,* 128 U. S. 438 at 452. The words "at the same time" in Order 32 clearly appear to be plain and subject to but one construction. The words "at the same time" cannot be regarded as superfluous or meaningless. Regard must be had for all words used by the Court, and as far as possible give effect to them. *Louisville, etc., vs. Mottley,* supra, at 475, citing *Market vs. Hoffman,* 101 U. S. 112 at 115, where the court states:

"It is a cardinal rule of statutory construction that significance and effect shall if possible be accorded to every word. As early as in Bacon's Abridgment Sect. 2, it was said that 'a statute ought upon the whole to be so construed that if it can be prevented no clause, sentence or word shall be superfluous, void or insignificant.' "

To like effect *Pirie vs. Chicago Title & Trust Co.*, supra, at 444.

The Circuit Court without discussion of the point, fails to give effect to the plain meaning of the words "at the same time," and in addition fails to give significance to the omission of the prior provision for the ten-day period which the words "at the same time" have substituted. By extending the time for filing specifications, specifications are not filed at the same time as the appearance in opposition, but at different times. This, in application, construes the words "at the same time" to mean "at different times," and would appear to be an impossible construction.

The Circuit Court states that the amended order does not prescribe the procedure in case objections are made within the designated time, suggesting the case where objections are filed in time, but specifications are not. The absence of such provision should have strongly persuaded the court that the order as amended does not contemplate that the filing of specifications might be an act severable in time from the appearance, but must be "at the same time."

Not only must the specifications be filed at the same time as the appearance, but the time referred to is the day when creditors are required to show cause and not some other time later. This gives effect to all words of the order as amended and omissions from the previous order.

A further guide for construction has been disregarded by the Circuit Court in its failure to give significance to the omission of the provision appearing in the prior order, "unless the time shall be shortened or enlarged by special order of the Judge." A number of amendments prior to the instant amendment to the general orders have taken place since Order 32, in its previous form was first in effect, notwithstanding which amendments the provision for enlarging or shortening the time was retained in Order 32 until the present amendment. The fact that such provision has been eliminated from Order 32 is of great significance as indicating a departure from the previous practice of permitting the court in its discretion to shorten or enlarge the time.

This line of argument, though inversely applied, is stressed in connection with a problem before the court in *Manhattan Properties, Inc., vs. Irving Trust Co.*, 291 U. S. 320.

As stated in *Pirie vs. Chicago Title & Trust Co.*, 182 U. S. 438 at 448, in respect to the omission of a phrase in a new act which had previously appeared in a former act:

> "The words in italics are omitted from the Act of 1898. Was the omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition. Was it left out in words to be put back by construction? Taken from the certainty given by prior use, and prior decisions and committed to doubt and controversy? There is a presumption against it. When the purpose of a prior law is continued, usually it words are, and an omission of the words implied an omission of the purpose."

Had the Supreme Court intended to permit the court to retain the discretionary power to extend time, it would have inserted a provision to that effect, particularly since such provision was already contained in Order 32, as it stood before the amendment. The fact that it was deliberately omitted would seem to allow and practically compel only one conclusion, and, that is, that it was intended to deprive the courts of the discretion they had formerly exercised in connection with the filing of specifications. To hold, that in spite of the amendment, the court still retains a discretion to extend time would be to construe the amended order as if it contained the very provision it was omitting. As quoted above "was it left out in words to be put back by construction?" Obviously not. As indicated in *Guarantee Title, etc., vs. Title Guaranty, etc.,* 224 U. S. 152 at 160, a change in provisions in a certain respect indicates a change of purpose in that respect.

It has been suggested by respondents below, and by Remington (4th Ed. Sec. 3201), and in effect by the court below, that such provision was omitted because unnecessary. This is contrary to the rules of construction above mentioned, and it is significant that while the provision for enlarging time was omitted in amended Order 32, that General Orders V-3, XVII-2 and XXI-3 and L-3 and 4, (11 U. S. C. A. §53) in express language, contain specific provisions that specified action should be limited "unless further time * * * is granted by the court." The failure to so specify in Order 32 becomes significant, and cannot be laid either to an intention of the Supreme Court to economize on words, or that it was careless in neglecting to add such provision; nor can it be argued that the phrase was omitted because there is a general power in the courts to extend the time, for upon the same assumption it could have eliminated the provision for further time as set out

in orders V-3, XVII-2, and the others mentioned above. The obvious and natural construction to the amendment, which gives effect to all changes and omissions, is that the filing of specifications is to be made concurrently with the appearance in opposition, and that the court no longer has any discretion to extend the time for filing specifications to a date beyond that upon which the creditors are required to show cause against the discharge.

POINT II.

The court should not have held that bankrupt acquiesced in an extension of time to file specifications.

The court states in its opinion, and discusses, at length, the fact that bankrupt's counsel was in court on the return day of the order to show cause for the discharge, and that bankrupt's counsel did not object to the order extending time to file specifications. The record does not disclose that either the bankrupt or her counsel were present in court on that day, and the fact is that they were not. Contrary to the statement in the opinion, neither were present to either object or acquiesce to the order then being made. The affidavit of one of respondent's attorneys (R. 32) unequivocably substantiates this fact.

The record does not disclose, nor is it a fact, that either the bankrupt or her attorney knew on the return day or prior thereto, that an order extending the time to file specifications would be asked for or be granted. Even though they acquired such knowledge the earliest possible moment after the return day, it would have been too late to have made any objection, assuming for argument, that there was

any duty on their part to object. As stated in *Pence vs. Langdon*, 99 U. S. 578 at 581 (italics ours):

> "Acquiescence and waiver are always questions of fact. There can be neither without *knowledge*. The terms import this foundation for such action. *One cannot waive or acquiesce in a wrong, while ignorant that it has been committed.* Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action."

In addition to having knowledge of the order, it would also seem to be essential that bankrupt should know that the order for extension to be entered was erroneous. There is nothing in the record to indicate that bankrupt or bankrupt's counsel had knowledge of the fact that the filing of specifications was required on the same day as the appearance and the implications from the citation above set forth would indicate that the acquiescence in such order by bankrupt, would necessitate her having knowledge of the law applicable to the order as well as of the fact of its entry.

The Circuit Court emphasizes bankrupt's failure to object. Respondents not only failed to object but moved for the entry of the order upon which the appeal was based. The fact of the matter is that the situation in this case arose by error, probably because of the recentness of the amendment.

Nothing was done by the bankrupt to mislead either the court or objecting creditors. They were free at all times to do whatever they thought was proper under the circumstances; neither advised nor influenced by the bankrupt. Any error in their judgment was wholly their own responsibility. It is not the only situation in which rights of litigants have been affected through mistakes, excusable or

otherwise, of attorneys. There is no reason why bankrupt should be charged with the duty of exercising a supervisory control over the court, or over the objecting creditors' counsel, to see that they conducted the business on hand properly.

Even though bankrupt had knowledge of the facts and was present to object, the lower court's apparent conclusion, that bankrupt's silence amounted to acquiescence, should not be accepted as well founded. In the case of *Spelke vs. Shaw,* 117 Connecticut 639, the Supreme Court at page 646 answered such argument as follows:

> "The most that this record shows is failure of the defendants to object at or before the expiration of the winter session, to further consideration of the case and to rendition of judgment thereafter. Implications from silence or inaction, however, import some duty or occasion to speak or act and in order to imply consent that rendition of judgment in the present case might be deferred beyond the limit of time imposed by statute, there must be found to exist some obligation on the part of the defendants or their counsel either seasonably to admonish the trial judge that the statute must be complied with, or after the second session and before judgment, to interpose objection to its entry thereafter. We find no justification for so far extending the duty of a party or his counsel."

In *Investment Registry vs. Chicago & M. E. R. Co.,* 212 Fed. 594 (C. C. A. 7th) at 604; though not precisely in point, the court held that appellant, even after the entry of an order setting aside a sale because of alleged stifling of competitive bidding, was not held to have deemed to have waived the right to object to such order by appealing there-

from, nor was it to be taken as an admission of wrongdoing, even of inadequacy of the bid. There was more than silence in that case, an affirmative act which might have been construed to have been not only an acquiescence, but an affirmation of the propriety of the order, upon which later an appeal was based.

The fact that respondents' counsel may not have known of the amendment to this order is no excuse for their failure to file specifications on time, nor is there any justification for their shifting the burden of properly conducting the matter to the bankrupt, even though bankrupt knew of the change at the time, which she did not.

In the matter of *United Wall Paper Factories, Inc., vs. Harley M. Hodges,* (C. C. A. 2nd) 70 Fed. (2nd) 243, the objecting creditors did not know of the amendment and further claim to have been misled by the referee, and by a local rule, the court held:

> "The amendment" (to Order 32) "allowed a week for news of it to percolate; an interval plainly thought adequate to inform those interested. If so, the court must have meant that ignorance should not thereafter be an escape from the requirement and we must enforce that purpose. Indeed, were this not so, we should have to decide in each case whether the actual interval had been long enough in reason to charge creditors. Was the single month enough which had here elapsed, or were three or six necessary? On what information might creditors rely, other than the official sources? Such inquiries we conceive to be irrelevant; the law is imperative; all are bound at their peril to learn its commands. It will not stop to ask how far those subject to it have in fact learned their content. There may be

excuses for failing to comply, but ignorance is not one."

To avoid the necessity of reply to respondents we may mention that in the court below respondents insisted that it was the bankrupt's duty to be present on the return day, citing *in re Shanker,* 138 Fed. 862, as authority, and another case inapplicable because based on a local rule. That case relates to the duty of the bankrupt to be present at the *hearing* upon the specifications in opposition pursuant to the provision of Section 7 of the Bankruptcy Act. It may be noted that the appearance is not required on the *return day* of the order to show cause against the discharge, but upon the *hearing.* On such return day specifications may or may not be filed. If filed the time is set for hearing upon the issues raised by the specifications. We submit therefore, that the bankrupt had no duty to be present on the return day of the order to show cause, and if she did, her absence could not confer upon the District Court an enlarged authority to extend the time to file specifications, if such authority had been taken away by amendment to Order 32, as we contend. Further, without special objection to the bankrupt's failure to appear or request for her appearance at the time complained of, we submit that the penalty for such absence is not such resulting acquiescense to an order, if improper, as to preclude her from questioning the propriety thereof by appeal.

Conclusion.

The Circuit Court of Appeals has decided an important question of bankruptcy procedure which, having in mind abuses presumably contemplated to be corrected, and the benefits to accrue from the amendment to Order 32, should

have an authoritative decision of this court as to its correct construction. In arriving at its conclusions, the court below appears to have disregarded all applicable rules of construction, which we submit is an unsatisfactory precedent to be established for construing acts or orders.

The uncertainty already existing as to the correct construction to be given to Order 32 as amended pointed out in the petition herein can be settled by this Court's ruling.

The lower court's ruling upon the question of acquiescence is an important matter of general law which we believe has been improperly declared, and should not be permitted to stand as setting forth the proper rule.

For which reasons petitioner submits that the Writ of Certiorari should be granted.

Respectfully submitted,

EMIL HERSH,
Attorney for Petitioner.

HERBERT MORSE,
Of Counsel.

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CITATIONS.

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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 292

In the Matter of MINNIE LERNER, Bankrupt.

MINNIE LERNER,

Petitioner,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, WISCONSIN, JAKE RAKITA, SARAH RAKITA, HARRY BLUMENFELD and DORA BLUMENFELD,

Respondents,

On Writ of Certiorari
To The United States Circuit Court of Appeals
for the Seventh Circuit.

BRIEF FOR THE PETITIONER.

Opinion Below.

There was no opinion in the District Court. The opinion of the Circuit Court of Appeals (R. 34-36) is reported in 70 Fed. (2d) 938.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 8, 1934 (R. 37). A petition for a rehearing was denied on June 19, 1934, and a stay of the mandate was granted on the same day (R. 38). The jurisdiction of this court is invoked under Section 240 A of the Judicial Code as amended by the Act of February 13, 1925.

Statement of Facts.

The petitioner, Minnie Lerner, was adjudicated a bankrupt on May 22, 1933, and on October 6, 1933, made application for a discharge in bankruptcy. Notice to creditors was given on October 10, 1933, reciting, that the bankrupt had filed her petition for discharge, that the same would be heard before the court on the 18th day of November, 1933, at ten o'clock in the forenoon, and that all creditors may appear at said time and place and show cause why the same should not be granted (R. 2).

On November 17, 1933, the Respondent, First Wisconsin National Bank of Milwaukee, Wisconsin, filed an appearance in opposition, and a written request to the court for an extension of time within which to file specifications, to November 28, 1933 (R. 3). On November 18, 1933, the other Respondents entered their appearances in open court to oppose the discharge in bankruptcy (R. 3-4). Neither bankrupt nor her attorneys appeared before the court on November 18, 1933, the return day of the petition for discharge (R. 32). The record shows that on November 28, 1933, an order granting objecting creditors time to file specifications was filed (R. 4), and on that date written specifications of objections were filed for Respondents (R. 4 and 9).

On December 15, 1933, bankrupt moved to strike the specifications because the same had not been filed within the time limited by General Order 32 (11 U. S. C. A. Sec. 53), as amended April 17, 1933 (R. 11), which motion was denied by the District Court (R. 12) on December 16, 1933.

An appeal, from the order denying this motion, was allowed by the Circuit Court of Appeals for the Seventh Circuit on January 4, 1934 (R. 18). Respondents moved to dismiss the appeal (R. 29-31), which motions were not granted, the cause being considered on the merits (R. 33), and the District Court order denying bankrupt's motion to strike the specifications was affirmed by the Circuit Court of Appeals. The Court's opinion is set forth at R. 34, and judgment at R. 37. The petition for re-hearing being denied, a stay of the mandate was granted (R. 38).

Questions Presented.

1. Has the District Court authority to extend the time for filing of specifications of objections beyond the time of appearance in opposition, and beyond the date set for showing cause against a charge of bankruptcy under General Order 32 (11 U. S. C. A. Sec. 53), as amended, by the Supreme Court on April 17, 1933?

2. Does the failure of the bankrupt to be present or represented, on the day when creditors are required to show cause in opposition to application for discharge, constitute such acquiescence as a matter of law, as to estop her from challenging the District Court's authority to extend the time to file specifications?

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

(1) In holding that General Order 32, as amended, gave the District Court any discretion to extend the time to file specifications.

(2) In holding that the Bankrupt's absence or failure to object, on the show cause date of hearing for discharge, constituted such acquiescence as to preclude her from questioning the propriety of the order extending the time.

SUMMARY OF ARGUMENT.

I.

Historical survey of General Order 32 shows that the District Court had discretion to enlarge the time for filing specifications for a period of about sixty years, commencing with General Order 24, under the Bankruptcy Act of 1867, to the amendment of General Order 32, under the Bankruptcy Act of 1898, on April 17, 1933. Since the amendment of 1933, the courts have held that the District Court lost the right to extend the time to file specifications. Decisions prior to the amendment are not helpful in construing the amended General Order, as those cases dealt with the provision of the order granting the right to enlarge the time for filing specifications.

The opinion of the court below is attempted to be justified on the general equity power of the court, not in endeavoring to construe the order as amended.

General Orders have the same force and effect as the Act itself, and are to be construed by the same rules of construction. Amendment of Orders in bankruptcy, generally,

indicate the intention of the Supreme Court to take away the discretion of the District Court to enlarge or shorten the time for filing specifications.

It is apparent that changes in the Order were intended by the Supreme Court, and in construing the Order, all changes must be given their plain and natural meaning. Permitting the filing of specifications after the return day is not following the plain language of the Order.

The amended Order can only be construed as intending to deprive the courts of the discretion they formerly had in connection with filing specifications. To hold otherwise would be to put in by construction that which the court left out by amendment. The natural construction to the amendment which gives effect to all changes and omissions is that the filing of specifications must be made concurrently with the appearance in opposition, that the court no longer has any discretion to extend the time for filing specifications. General Order 37 does not give the District Court any authority to extend the time for filing specifications, as this Order has reference to plenary suits at law and equity, and does not apply to proceedings in bankruptcy.

II.

Court's conclusion that bankrupt acquiesced in court's making order extending time is based on erroneous statement of fact. Neither bankrupt, nor her attorneys, appeared in court on the return day, had no knowledge that Respondents would ask for an extension, or that the Court would grant it, consequently there could be no acquiescence. Bankrupt is not responsible for Order made contrary to law. Error was wholly on Respondent's part. Bankrupt is not charged with duty of exercising supervisory control over the court or Respondent's counsel, to assure proper orders being entered.

Ignorance of the amendment is no excuse for granting an extension of time, nor should the bankrupt be charged with acquiescence therefor even though bankrupt knew of the change in the Order.

Bankrupt's attendance on the return day is not required by the Bankruptcy Act. The bankrupt is only required to be present upon the hearing. This contemplates a hearing after issue is joined, and not the return day.

ARGUMENT.

I.

The 1933 amendment to General Order 32 removes the discretion theretofore vested in a a Judge to enlarge the time for the filing of specification of objections to a discharge.

(a)—Historical survey of General Order 32 suggests change intended.

Inasmuch as General Order 32, as amended, was promulgated by the Supreme Court, it would seem superfluous to argue the rules of construction which should be followed by the court in considering its own order, except, that the disregard of such rules form the basis of petitioner's specification of errors.

An historical survey of General Order 32 is instructive in showing that the Supreme Court intended to take away the District Court's discretion in extending the time for filing specification of errors. The Bankruptcy Act of 1867 provided with reference to discharge in bankruptcy, General Order 24 as follows:

"Opposition to Discharge. A creditor opposing the application of a bankrupt for discharge shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file his specification of the grounds of his opposition, in writing, within ten days thereafter, *unless the time shall be enlarged by order of the District Court* in the case, and the Court shall thereupon make an order as to the entry of said case for trial on the docket of the District Court, and the time within which the same shall be heard and decided."

We call the Court's attention to the phrase in the above General Order which we have italicized.

In 1898 the United States Supreme Court adopted, with reference to opposition to discharge, General Order 32, which read as follows:

"A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, *unless the time shall be enlarged by special order of the Judge.*"

Prior to the amendment of 1933, only one minor change was made in General Order 32. By amendment of this Order promulgated June 4, 1917, the last clause was amended to read as follows: "unless the time shall be shortened or enlarged by special order of the Judge." 244 U. S. 641.

General Order 32, before the 1933 amendment, read as follows:

> "A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition *within ten days thereafter, unless the time shall be shortened or enlarged by special order of the Judge.*"

On April 17, 1933, this General Order was amended, effective as of April 24, 1934, and now reads:

> "A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, *and shall at the same time file a specification in writing of the grounds of his opposition.*"

For a period in excess of sixty years the Supreme Court granted a Federal Judge discretion to enlarge the time for filing specifications, and under these General Orders, the courts have been liberal in granting extensions, beyond the show cause date.

In re Rerat, 14 Fed. (2d) 607, affirmed 28 Fed. (2d) 607 (C. C. A. 8th Cir.).

Schlesinger vs. Phillips, 36 Fed. (2d) 191.

In re Nathanson, 152 Fed. 585.

In re Brecher, 4 Fed. (2d) 1001.

(b)—Decisions since 1933 amendment confirm changes intended.

Since the 1933 amendment, at least three District Courts, and the Second Circuit Court of Appeals, held that the amended order took away from the District Court the discretion to extend the time for filing specifications. These cases, following proper rules of construction, reached the conclusion contended for by petitioner. The cases are as follows:

Matter of Harley M. Hodges, 4 Fed. Supp. 804, affirmed 70 Fed. (2d) (C. C. A. 2nd Cir) 243.
Matter of Cornelius J. Corcoran, 4 Fed. Sup. 988.
In re Gorman, Dist. Court, Western District, So. Carolina. No official reporter citation available. Found under Section 3072, Bankruptcy Law Service, Commerce Clearing House Inc.

These courts assumed rightly that the Supreme Court intended a change in General Order 32, and their decisions gave full effect to the changes in the order.

(c)—Prior decisions not helpful in construing amended order.

Decisions prior to the amendment referred to by the court, and by respondent, holding that the court could enlarge the time for filing specifications, must be read in light of the fact that General Order 32, prior to the amendment, specifically provided that ten days after appearance would be allowed for filing specifications "unless the time should be shortened or enlarged by special order of the Judge." That clause has now been omitted, and accordingly to apply prior decisions is to beg the question whether such decisions are now applicable notwithstanding the changes in the order. To hold that such decisions are now

applicable would be an utter disregard of the plain intent of the General Order, as amended.

The opinion of the court below indicates no intent to give effect to the changes in the General Order. The court stated its opinion of what the amendment did not do. It has not indicated what it thought the Supreme Court intended by amending the order. The court endeavors to justify its conclusion by reciting that a court of bankruptcy is a court of equity; that the Bankruptcy Act is administered by such a court, and concludes that specifications being pleadings, the time to file may be extended. As a matter of fact, the court should have determined whether or not the amendment put General Order 32 in a mandatory or directory class of orders. The Bankruptcy Act has placed various limitations on the District Courts which restrict their general powers. For example, there are limitations on the time for an appeal; limitations of the time within which creditors may file claims; limitations within which petitions for discharge may be filed; limitations within which petitions to revoke a discharge may be filed. The class to which General Order 32 belongs depends upon the construction to be placed on it, rather than upon the general rule relating to the discretion of the court to grant extensions of time to plead.

General Orders in Bankruptcy are to be regarded as the act itself, from which it follows that the same rules for construing an act should be applied in construing General Orders. General Orders are regarded as is the statute itself, and have the same force as a provision of the statute.

Matter of Brecher, 4 Fed. (2d) 1001.
Wilkenson vs. Waters, 292 Fed. 395.

(d)—Amendments, generally, of orders in bankruptcy show that change was intended.

Statutes, or in this case, General Orders, may be either directory or mandatory. Whether they are one or the other depends on the intent of the rule-making body. A study of the changes made in General Orders by the order of April 17, 1933, discloses that one of the obvious intents of the Supreme Court was to accelerate proceedings in Bankruptcy. Aware of existing economic conditions and heeding the general clamor that debtors be relieved by direct and unhampered administration of statutes already extant for their benefit as well as by the immediate new legislation then being formulated, the Supreme Court made these changes to remove from Bankruptcy practice certain delays which in normal years had not seemed too great. (See Article in May, 1933, issue of American Bankruptcy Review, Vol. IX, 279.) In addition to the change in General Order 32, the following significant amendments were made by the same Order of April 17, 1933:

1. A new section (4) was added to General Order 12 providing that Referees should call the first meeting of creditors in involuntary proceedings begun by petition without schedules immediately upon the petitioner's filing a verified list of creditors without awaiting the filing of schedules.

2. Section 2 of General Order 17 was amended to provide that the trustee should make his report of articles set off to bankrupt within five days of his appointment "unless further time is granted by the court." Prior to this amendment, the trustee was allowed twenty days.

3. This same section of General Order 17 was further amended by providing that creditors' objection to this re-

port should file exceptions thereto within ten days "unless further time is granted by the court." Before this change creditors were allowed twenty days.

4. Section 5 of General Order 17 was amended to provide that the referee should cause the trustee to be served with an order to show cause why he should not be removed for failure to file reports three days before the hearing thereon. Formerly seven days notice of such show cause order was required.

It is only logical to assume that in furtherance of its intent to hasten proceedings the Supreme Court also made the change in General Order 32.

The Supreme Court in its Order of April 17, 1933, clearly evidenced its intention as to the existence or nonexistence of discretionary power in the lower courts to enlarge a specified time. Where the Court intended that discretion which formerly did not exist should be created, that discretion was specifically provided for. (See General Orders V, 3; XVII, 2, as amended April 17, 1933.) Where the intent was that the same discretion which had existed should continue, it was retained. (See General Order XXI, 3, prior to amendment of April 17, 1933, and after said amendment.) Where it was intended that the discretion, which had been conferred under General Order 32, should exist no longer, the clause conferring discretionary power was omitted.

General Order 32 as amended, compared with the order prior to amendment, shows two distinct changes: *First,* the amended order states that creditors shall file specifications *at the same time* as the appearance in opposition upon the day creditors are to show cause, instead of within ten days thereafter; and *Second,* the provision "unless

the time be shortened or enlarged by special order of the Judge" has been entirely omitted in the amendment.

The Circuit Court of Appeals failed to give any effect to these changes. No rules of construction available are applied or discussed in the opinion, no reason stated why they do not apply, and no statement is made as to what rules of construction were followed in arriving at the conclusion that the court did.

(e)—Presumption that changes in General Order were intended by amendment.

That changes were intended by the Supreme Court must be inferred from the changes in language made by the amendment. As stated in *Crawford vs. Burke,* 195 U. S. 176, at 190:

> "Our own view, however, is that a change in phraseology creates a presumption of a change in intent."

In *Louisville & Nashville Railroad Co. vs. Mottley,* 219 U. S. 467, at 475, in respect to the change in the act there considered, the court says:

> "We cannot suppose that this change was without a distinct purpose on the part of Congress."

To apply the language of 25 *R. C. L.* at 1051, to the instant order, rather than to an act of the legislature as there dealt with, the Supreme Court must be presumed to have known both the language employed in former orders, and the judicial construction placed upon them; if in the amended order on the same subject, it uses different language in the same connection, the courts must presume that a change of the law was intended.

Where the statute is plain and unambiguous in its terms, the courts must enforce the law as they find it.

Pirie vs. Chicago Title & Trust Co., 182 U. S. 438, at 452. The words "at the same time" in General Order 32 clearly appear to be plain and subject to but one construction. These words cannot be regarded as superfluous or meaningless. Regard must be had for all words used by the court, and so far as possible give effect to them. *Louisville, etc., vs. Mottley, supra,* at 475, citing *Market vs. Hoffman,* 101 U. S. 112, at 115, where the court states:

> "It is a cardinal rule of statutory construction that significance and effect shall if possible be accorded to every word. As early as in Bacon's Abridgment Sec. 2, it was said that 'a statute ought upon the whole to be so construed that if it can be prevented no clause, sentence or word shall be superfluous, void or insignificant.'"

(f)—Effect to be given amendment by opinion of lower court is not clear.

The Court of Appeals, without discussing the point, fails to give effect to the plain meaning of the words "at the same time," and in addition fails to give significance to the omission of the prior provision for the ten day period which the words "at the same time" substituted. By extending the time for filing specifications, they are not filed at the same time as the appearance in opposition, and are filed at different times. The court's construction of the words "at the same time" means the filing of specifications at different times, and is an impossible construction of the language used by the Supreme Court in this order.

The Court of Appeals states that the amended order does not prescribe the procedure in case objections are made within the designated time, suggesting the case where objections are filed in time, but specifications are not. The absence of such provision should have persuaded

the court that the order as amended did not contemplate the filing of specifications beyond the return day, but must be at the same time with the objection to the discharge as interposed. By the requiring of filing of specifications at the same time as the appearance, gives effect to all words of the order as amended, and the omissions from the previous order.

As stated in *Pirie vs. Chicago Title & Trust Co.*, 182 U. S. 438, at 448, in respect to the omission of a phrase in a new act which had previously appeared in a former act:

> "The words in italics are omitted from the Act of 1898. Was the omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition. Was it left out in words to be put back by construction? Taken from the certainty given by prior use, and prior decisions and committed to doubt and controversy? There is a presumption against it. When the purpose of a prior law is continued, usually its words are, and an omission of the words implied an omission of the purpose."

Had the Supreme Court intended to permit the court to retain the discretionary power to extend time, it would have inserted a provision to that effect, particularly since such provision was already contained in Order 32, as it stood before the amendment. The fact that it was deliberately omitted would seem to allow and practically compel only one conclusion, and, that is, that it was intended to deprive the courts of the discretion they had formerly exercised in connection with the filing of specifications. To hold, that in spite of the amendment, the court still retains a discretion to extend time would be to construe the amended order as if it contained the very provision it was

omitting. As quoted above "was it left out in words to be put back by construction?" Obviously not. As indicated in *Guarantee Title, etc., vs. Title Guaranty, etc.*, 224 U. S. 152, at 160, a change in provisions in a certain respect indicates a change of purpose in that respect.

(g)—Language of order is clear.

It has been suggested by respondents below, and by *Remington*, (4th Ed. Sec. 3201), and in effect by the court below, that such provision was omitted because unnecessary. This is contrary to the rules of construction above mentioned, and it is significant that while the provisions for enlarging time was omitted in amended Order 32, that General Orders V-3, XVII-2 and XXI-3 and L-3 and 4 (11 U. S. C. A. Sec. 53), in express language, contain specific provisions that specified action should be limited "unless further time * * * is granted by the court." The failure to so specify in Order 32 become significant, and cannot be laid either to an intention of the Supreme Court to economize on words, or that it was careless in neglecting to add such provision; nor can it be argued that the phrase was omitted because there is a general power in the courts to extend the time, for upon the same assumption it could have eliminated the provision for further time as set out in the orders mentioned above. The obvious and natural construction to the amendment, which gives effect to all changes and omissions, is that the filing of specifications is to be made concurrently with the appearance in opposition, and that the court no longer has any discretion to extend the time for filing specifications to a date beyond that upon which the creditors are required to show cause against the discharge.

(h)—General Order 37 has no application to proceedings in bankruptcy.

Respondent has likewise urged, in the court below, that General Order 37 authorized the District Court to vary the time within which to file specifications. This intention cannot be sustained because the courts have uniformly held that this section has no application to proceedings in bankruptcy.

International Harvester Co. vs. Carlsen, (C. A. A. 8th) 217 Fed. 736 at 739.

In re Brookstone Mfg. Co., (C. C. A. 1st) 239 Fed. 697, at 699.

Daniel vs. Guaranty Trust Co., 284 U. S. 602.

II.

The court should not have held that bankrupt acquiesced in an extention of time to file specifications.

(a)—Court's conclusion is based on erroneous assumption of fact.

The Court states in its opinion, and discusses, at length, the fact that bankrupt's counsel was in court on the return day of the order to show cause for the discharge, and that bankrupt's counsel did not object to the order extending time to file specifications. The record does not disclose that either the bankrupt or her counsel were present in court on the day, and the fact is that they were not. Contrary to the statement in the opinion, neither was present to either object or acquiesce to the order then being made. The affidavit of one of respondent's attorneys (R. 32) unequivocably substantiates this fact.

(b)—Knowledge is a pre-requisite to acquiescence.

The record does not disclose, nor is it a fact, that either the bankrupt or her attorney knew on the return day or prior thereto, that an order extending the time to file specifications would be asked for or be granted. Even though they acquired such knowledge, the earliest possible moment after the return day, it would have been too late to have made any objection, assuming for argument, that there was any duty on their part to object. As stated in *Pence vs. Langdon,* 99 U. S. 578 (Italics ours):

> "Acquiescence and waiver are always questions of fact. There can be neither without *knowledge.* The terms import this foundation for such action. *One cannot waive or acquiesce in a wrong, while ignorant that it has been committed.* Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action."

In addition to having knowledge of the order, it would also seem to be essential that bankrupt should know that the order for extension to be entered was erroneous. There is nothing in the record to indicate that bankrupt or bankrupt's counsel had knowledge of the fact that the filing of specifications was required on the same day as the appearance and the implications from the citation above set forth would indicate that the acquiescence in such order by bankrupt, would necessitate her having knowledge of the law applicable to the order as well as of the fact of its entry.

The Circuit Court emphasizes bankrupt's failure to object. Respondents not only failed to object but moved for the entry of the order upon which the appeal was based. The fact of the matter is, that the situation in this case arose by error, probably, because of the recentness of the amendment.

(c)—There must be duty to object before there can be acquiescence.

Nothing was done by the bankrupt to mislead either the court or objecting creditors. They were free at all times to do whatever they thought was proper under the circumstances; neither advised nor influenced by the bankrupt. Any error in their judgment was wholly their own responsibility. It is not the only situation in which rights of litigants have been affected through mistakes, excusable or otherwise, of attorneys. There is no reason why bankrupt should be charged with the duty of exercising a supervisory control over the court, or over the objecting creditors' counsel, to see that they conducted the business on hand properly.

Even though bankrupt had knowledge of the facts and was present to object, the lower court's apparent conclusion, that bankrupt's silence amounted to acquiescence, should not be accepted as well founded. In the case of *Spelke vs. Shaw*, 117 Connecticut 639, the Supreme Court at page 646, answered such argument as follows:

> "The most that this record shows is failure of the defendants to object at or before the expiration of the winter session, to further consideration of the case, and to rendition of judgment thereafter. Implications from silence or inaction, however, import some duty or occasion to speak or act, and in order to imply consent that rendition of judgment in the present case might be deferred beyond the limit of time imposed by statute, there must be found to exist some obligation on the part of the defendants or their counsel either seasonably to admonish the trial judgment that the statute must be complied with, or after the second session and before judgment, to interpose objection to its entry thereafter. We find

no justification for so far extending the duty of a party or his counsel."

In *Investment Registry vs. Chicago & M. E. R. Co.*, 212 Fed. 594 (C. C. A. 7th), at 604; though not precisely in point, the court held that appellant, even after the entry of an order setting aside a sale because of alleged stifling of competitive bidding, was not held to have deemed to have waived the right to object to such order by appealing therefrom, nor was it to be taken as an admission of wrong-doing, even of inadequacy of the bid. There was more than silence in that case, an affirmative act which might have been construed to have been not only an acquiescence, but an affirmation of the propriety of the order, upon which later an appeal was based.

(d)—Ignorance of the amendment no excuse.

The fact that respondents' counsel may not have known of the amendment to this order is no excuse for their failure to file specifications on time, nor is there any justification for their shifting the burden of properly conducting the matter to the bankrupt, even though bankrupt knew of the change at the time, which she did not.

In the matter of *United Wall Paper Factories, Inc., vs. Harley M. Hodges,* (C. C. A. 2nd) 70 Fed. (2d) 243, the objecting creditors did not know of the amendment and further claim to have been misled by the referee, and by a local rule, the court held:

"The amendment" (to Order 32) "allowed a week for news of it to percolate; an interval plainly thought adequate to inform those interested. If so, the court must have meant that ignorance should not thereafter be an escape from the requirement and we must enforce that purpose. Indeed, were

this not so, we should have to decide in each case whether the actual interval had been long enough in reason to charge creditors. Was the single month enough which had here elapsed, or were three or six necessary? On what information might creditors rely, other than the official sources? Such inquiries we conceive to be irrelevant; the law is imperative; all are bound at their peril to learn its commands. It will not stop to ask how far those subject to it have in fact learned their content. There may be excuses for failing to comply, but ignorance is not one."

(e)—Bankrupt not required to attend hearing on return day.

To avoid the necessity of reply to respondents we may mention that in the court below respondents insisted that it was the bankrupt's duty to be present on the return day, citing *In re Shanker,* 138 Fed. 862, as authority, and another case inapplicable because based on a local rule. That case relates to the duty of the bankrupt to be present at the *hearing* upon the specifications in opposition pursuant to the provision of Section 7 of the Bankruptcy Act. It may be noted that the appearance is not required on the *return day* of the order to show cause against the discharge, but upon the *hearing.* On such return day specifications may or may not be filed. If filed the time is set for hearing upon the issues raised by the specifications.

We submit therefore, that the bankrupt had no duty to be present on the return day of the order to show cause, and if she did, her absence could not confer upon the District Court an enlarged authority to extend the time to file specifications, if such authority had been taken away. Further, without special objection to the bankrupt's failure to appear or request for her appearance at the time com-

plained of, we submit that the penalty for such absence is not such resulting acquiescence to an order, if improper, as to preclude her from questioning the propriety thereof by appeal.

CONCLUSION.

It is respectfully submitted that the District Court had no authority to extend the time for filing specifications beyond the return day; that the bankrupt cannot be guilty of any conduct which can be construed as an acquiescence, and that by reason of the erroneous decision, the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

EMIL HERSH,
Attorney for Petitioner.

HERBERT MORSE,
I. J. POST,
Of Counsel.

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CHARLES ELMORE CR

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1934

No. 292

In the Matter of MINNIE LERNER,
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Petitioner,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, WISCONSIN, JAKE RAKITA, SARAH RAKITA, HARRY BLUMENFELD and DORA BLUMENFELD,

Respondents.

BRIEF FOR RESPONDENT FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1934

No. 292

In the Matter of MINNIE LERNER,
Bankrupt.

MINNIE LERNER,

Petitioner,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, WISCONSIN, JAKE RAKITA, SARAH RAKITA, HARRY BLUMENFELD and DORA BLUMENFELD,

Respondents.

BRIEF FOR RESPONDENT FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below

There was no opinion in the District Court.

The opinion of the Circuit Court of Appeals (R. 34-36) is reported in 70 Fed. (2d) 938.

Jurisdiction

The interlocutory decree of the Circuit Court of Appeals was entered May 8, 1934, (R. 37). The order

denying the petition for rehearing was entered June 19, 1934 (R. 38) and a stay of the mandate for ninety days was granted on June 19, 1934 (R. 38).

The jurisdiction of this court is invoked under Section 240-a of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether the United States Supreme Court will grant certiorari to review an interlocutory decree of the Circuit Court of Appeals affirming an order of the District Court which denies a motion to strike specifications of objections to a bankrupt's discharge.

2. Whether the reasons relied on by the petitioner are sufficient to invoke the extraordinary writ of certiorari.

3. Whether the District Judge has jurisdiction to enter an order on hearing of bankrupt's petition for discharge extending the time for ten days to file specifications of objections.

Statutes and General Orders Involved

The statutes and general orders involved are set forth in the appendix pages 28-30.

Statement

The petitioner Minnie Lerner was adjudicated a bankrupt on May 22, 1933, and on October 6, 1933, filed her petition for discharge (R. 2). Notice was given creditors setting November 18, 1933 as the day when the petition would be heard by the District Judge and creditors might show cause why the discharge should not be granted (R. 2-3). On November 17, 1933, respondent

First Wisconsin National Bank of Milwaukee duly filed a written notice of appearance in opposition to the petition for discharge and a written request to the court to extend the time to November 28, 1933, within which to file specifications (R. 3). On November 18, 1933, the respondents Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld appeared in opposition to the discharge and requested an extension to November 28, 1933, to file specifications of their objections (R. 3).

On November 18, 1933, the District Judge entered an order granting objecting creditors ten days time to file specifications of objections to the discharge of said bankrupt (R. 32).

On November 28, 1933 (within the time limited by the District Judge) written specifications of objections to the bankrupt's discharge were filed by the respondent First Wisconsin National Bank of Milwaukee, based upon three instances where the bankrupt transferred property with intent to hinder, delay and defraud her creditors (R. 9). On November 28, 1933 (within the time limited by the order of the District Judge) written specifications of objections to the bankrupt's discharge were filed by Jake Rakita and the other respondents, and a written order granting objecting creditors until November 28, 1933 to file specifications of objections, was filed (R. 4).

On December 15, 1933, bankrupt moved to strike the specifications because the same had not been filed within the time limited by general order XXXII (11 U.S.C.A. Para. 53), as amended April 17, 1933 (R. 11), which motion was denied by the District Court (R. 12) on December 16, 1933. The decree of the District Court was

an interlocutory order which required trial of the issues raised by the specifications filed by objecting creditors and will result in a final decree allowing or denying the bankrupt's discharge.

An appeal from the order denying this motion was allowed by the Circuit Court of Appeals on January 4, 1934, (R. 18). Respondents moved to dismiss the appeal (R. 29 and 31) which motions were not granted, the matter being considered on the merits (Decision R. 34). The District Court's order denying the bankrupt's motion to strike the specifications was affirmed by the Circuit Court of Appeals (R. 37). The decree of the Circuit Court of Appeals is an interlocutory decree which requires the trial of the issues raised by the specifications on file and will result in a final decree allowing or denying the bankrupt's discharge. A petition for rehearing was denied June 19, 1934 and a stay of the mandate for ninety days was granted (R. 38).

Summary of Argument

This petition for a writ of certiorari should be denied for the United States Supreme Court will not grant certiorari to review an interlocutory decree denying a motion to strike specifications of objections to a bankrupt's discharge. Upon denial of the petition for certiorari the District Court will hear the petition and evidence offered in support of the specifications and enter a final decree allowing or denying the discharge.

The order entered by the District Court is a preliminary order in a proceedings in bankruptcy. The order was affirmed by the Circuit Court of Appeals pursuant to its jurisdiction to revise and review under Section 24b of the Bankruptcy Act, and such decision should be final.

The petition for the writ fails to disclose adequate reasons for allowance of the writ. There is no conflict among the various Circuit Courts of Appeals covering the construction of General Order XXXII as amended April 17, 1933, and the other reasons relied on by the petitioner are unsubstantial and not within the terms of Rule 38 of the Revised Rules of the United States Supreme Court and applicable decisions.

The decree entered by the Circut Court of Appeals was clearly correct. On the return day several objecting creditors appeared in the District Court in opposition to the discharge, and on that day the District Judge entered an order granting ten days time within which to file specifications and the specifications were filed within said time. The District Judge has jurisdiction to vary the time for filing specifications which are uniformly held to be pleadings. Petitioner does not claim that the District Judge abused his discretion, but relies wholly upon the proposition that the District Judge has no discretion.

ARGUMENT

Point I.

The United States Supreme Court will not grant certiorari to review an interlocutory decree denying a motion to strike specifications of objections to a bankrupt's discharge.

This petition for a writ of certiorari should be denied because the United States Supreme Court will decline to review an interlocutory decree except under extraordinary circumstances. The order of the District Judge denying bankrupt's motion to strike out specifications has no finality. It does not end litigation but merely

requires a hearing of the specifications and at the end of the hearing a final decree will be entered allowing or denying the bankrupt's discharge. The District Court and the Circuit Court of Appeals have concurred in requiring a hearing upon these specifications and there is no showing of extraordinary inconvenience or embarrassment which is a condition precedent to invoking the jurisdiction of the Supreme Court for review by certiorari. The Supreme Court has defined a review on certiorari in Rule 38 (5) of Revised Rules of the Supreme Court of the United States as follows:

> "A review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor."

There are no special nor important reasons for granting certiorari in this case.

The Supreme Court has enunciated the following General Rule with respect to its jurisdiction under Sec. 240 of the Judicial Code:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. And, except in extraordinary cases, the writ is not issued until final decree."
>
> *Hamilton-Brown Shoe Co. vs. Wolf Bros. & Co.,* 240 U. S. 251, 258.

The present petition for certiorari should be denied and the District Court will proceed to hear the petition for a discharge. The objecting creditors will offer evidence in support of specifications based upon transfers of three pieces of property made with intent to

hinder, delay and defraud creditors. The District Court will enter a final decree granting or denying the bankrupt's discharge.

The Supreme Court of the United States has held that an appeal from an interlocutory decree must be dismissed for lack of jurisdiction. *Arnold v. United States,* 263 U. S. 427, where the court held at *page* 434:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

The rule is well established that this court will not review interlocutory decrees by appeal when appeal was the proper method for reviewing decrees of the Circuit Court of Appeals and was briefly enunciated in *American Construction Co. vs. Jacksonville, Tampa & Key West Railway Co.,* 148 U. S. 372, where the court held, at *page* 378:

> "Under the Judiciary Act of 1879 and other acts embodied in the Revised Statutes, the appellate jurisdiction of this court from the circuit court of the United States was limited to final judgments at law, and final decrees in equity or admiralty. Acts of September 24, 1789, chap. 20, Par. 13, 22 (1 Stat. at L. 81, 84); March 3, 1803, chap. 40 (2 Stat. at L. 244); Rev. Stat. Par. 691, 692. No appeal, therefore, lay to this court from an order of the circuit court, granting or refusing an injunction, or appointing or declining to appoint a receiver pendente lite, or other interlocutory order, until after final decree."

Subsequent to the Acts of Congress mentioned in that decision there have been several Acts passed for the purpose of relieving the overburden of controversies appealable as of right to the Supreme Court. One of the most recent of these is the Act of February 13, 1925, to amend the Judicial Code which provides in *Section* 240 (*c*); *Chapter* 229, 43 *Stat. at L.* 936:

> "No judgment or decree of a Circuit Court of Appeals or of the court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

The section provides for review by certiorari and the language of the Supreme Court of the United States in *American Construction Co. vs. Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, is peculiarly applicable to this subsequent legislation where the court says at *page* 382:

> "The primary object of this Act, well known as a matter of public history, manifest on the face of the Act, and judicially declared in the leading cases under it, was to relieve this court of the overburden of cases and controversies, arising from the rapid growth of the country, and the steady increase of litigation; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the circuit courts of appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the Act, the entire appellate jurisdiction from the circuit and district courts of the United States."

Furthermore, the interlocutory decree in this matter has been entered in a proceeding in bankruptcy as distinguished from a controversy arising in bankruptcy proceedings.

> "Questions arising as to the right of the bankrupt to his discharge are not 'controversies arising in bankruptcy proceedings' but are 'proceedings in bankruptcy' themselves." *Treatise on the Bankruptcy Law of U. S. by Harold Remington, Fourth Edition, Sec.* 3675.

A recent decision of what constitutes a controversy arising in bankruptcy proceedings appears in *Taylor vs. Voss,* 271 U. S. 176, 180, where this court defines such controversies in the following language:

> "It is now settled by the decisions of this court, that the 'controversies arising in bankruptcy proceedings' referred to in Sec. 24a, include those matters arising in the course of a bankruptcy proceeding, which are not mere steps in the ordinary administration of the bankrupt estate, but present, by intervention or otherwise distinct and separable issues between the trustee and adverse claimants concerning the right and title to the bankrupt's estate." (citing cases).

The order entered by the District Judge in this case was not appealable to the Circuit Court of Appeals under Sec. 24a Bankruptcy Act July 1, 1898, 30 Stat. L. 553; c. 541, s. 24 as amended May 27, 1926, because it is not a controversy arising in bankruptcy proceedings.

The order entered by the District Judge was not appealable to the Circuit Court of Appeals under Section 25a Bankruptcy Act July 1, 1898, 30 Stat. L. 553; c. 541, s. 25 as amended May 27, 1926, as it is not a judgment adjudging or refusing to adjudge the defendant a bankrupt; a judgment granting or denying a discharge; or a judgment allowing or rejecting a debt or claim of $500 or over.

The order entered by the District Judge was not appealable to the Circuit Court of Appeals except under

Sec. 24b of the Bankruptcy Act of 1898 as amended. Section 24b provides that the several Circuit Courts of Appeals shall have jurisdiction in equity either interlocutory or final to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Therefore, the character of the order entered by the Circuit Court of Appeals in this matter is merely an order entered pursuant to the jurisdiction of the Circuit Court of Appeals to superintend and revise in matter of law the proceedings of an inferior court of bankruptcy. It would seem that the Supreme Court of the United States should at this time definitely determine for the guidance of all the courts that decrees entered by any circuit court of appeals under the jurisdiction granted in Section 24b would never be reviewed by the Supreme Court of the United States on writ of certiorari.

Respondents moved in the Circuit Court of Appeals to dismiss the appeal upon the ground that the order appealed from was not final, was an order preceding a final decision, the appeal was premature and the District Court had properly exercised its dicretion.

The Circuit Court of Appeals held the order entered by the District Court to be appealable under Section 24b of the Bankruptcy Act of July 1, 1898, 30 Stat. L. 553, c. 541, s. 24, which as amended May 27, 1926, provides:

> "24(b) The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in Section 25) the proceedings of the several inferior

courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said Section 25 to be allowed in the discretion of the appellate court."

However, what was said in support of the motion to dismiss is even more pertinent with respect to this petition to the Supreme Court for the writ of certiorari. The order of the District Judge refusing to strike specifications of objecting creditors ended nothing. There was no finality about such an order. There was no finality about the decree of the Circuit Court of Appeals affirming the order which should invoke certiorari by the Supreme Court to review such a preliminary order. The Circuit Court of Appeals has frequently held that it is not required to consider an appeal under Section 24b unless the decree has a certain degree of definiteness and finality.

In a leading case the Circuit Court of Appeals for the 3rd Circuit provided the definition of the kind of orders and decrees which would be considered on appeal under Section 24(b). Such decrees must have a certain degree of definiteness and finality in order to be appealable under Section 24(b). In this case, In *re Chotiner,* 218 F. 813, the court said, at page 813:

"Section 24b does not require us to revise every interlocutory order that may affect the course of a bankruptcy proceeding, whatever the nature or scope of the order may be; and we need hardly add that it is not part of our duty to answer questions, unless they arise in a proper appellate proceeding. Under Section 24b we can only be asked to review such orders or decrees when they have a certain degree of definiteness and finality. Moreover, there must always be numerous minor matters of administration

in which the District Court should be allowed to exercise a sound discretion that will ordinarily not be disturbed."

"In the case before us, the court has taken no positive, affirmative step in the cause, and has done nothing to affect definitely the rights of the petitioner. The record discloses merely an order by the District Judge reversing an order of the referee that confirmed a sale of the bankrupt's property, thus leaving the property still in the hands of the trustee."

In *In re Margolies,* 266 F. 203 C.C.A. 2d Circuit, there was a petition to revise and review an order of the District Court for the Eastern District of New York. Bankrupts were adjudicated in January 1918 and Margolies was discharged in July 1919. Some months later, the estate being closed, the Trustee required Margolies to show cause why an order should not pass requiring him to turn over to said Trustee about $7000 alleged to represent the value of property concealed and withheld by him from his estate in bankruptcy. Margolies appeared and pleaded that the court was without jurisdiction to entertain the motion because he had been discharged. This was overruled and an order entered sending the matter to a Commissioner to ascertain the facts and report. This order the petitioner brings up for review. The court held, on page 203:

" . . . The order complained of is plainly interlocutory, for the petitioner has as yet been required neither to pay nor perform; the trustee is given leave to prove his case—nothing more. It is also in a sense discretionary, for the court might have considered . . . that the certain expense of the proposed investigation outweighed probable gain."

" . . . We have pointed out that under the statute discretionary orders can be revised only for abuse of discretion, which is error of law (In re Weiden-

> feld, 254 Fed. 680, 166 C.C.A. 175) and that while we can review interlocutory proceedings, it is not advisable so to do (In re Strauss, 211 Fed. 123, 127 C.C.A. 521; In re Horowitz, 250 Fed. 106, 162, C.C.A. 278)."

One of the cases relied upon in In re Margolies is In *re Horowitz,* et al, 250 F. 106, C.C.A. 2d Circuit. This was a petition to revise an order of the District Court in bankruptcy proceedings. Bankrupts petitioned to revise an order relieving the Trustee from a stipulation relating to objections to the bankrupt's discharge. The petition was dismissed. The court held as follows: the bankrupt was presenting his application for discharge before the Referee; there had been delay in the matter; and the court stated page 107:

> " . . . and finally a stipulation was entered on the record that the matter should proceed on a day named, and unless the trustee as objector was ready, and went forward on that day, the referee should report in favor of discharge. On the day appointed, the trustee's attorney was not present, and the referee gave report recommending discharge as on default."

On the matter coming before the District Court for confirmation he relieved against the stipulation and ordered a further opportunity for hearing. This order is the subject of this review. The Circuit Court of Appeals held, on page 107:

> "(1) Nothing but matters, both interlocutory and of discretion, are here exhibited. Doubtless for error of law there is power in this court to revise even interlocutory proceedings in bankruptcy; but such resort to us is not favored when the matter can be raised by appeal or petition from the order or decree finally disposing of the matter."

The Supreme Court of the United States has almost never granted a writ of certiorari to review a decree entered by a Circuit Court of Appeals wherein its jurisdiction arose under Section 24b. A leading text writer states:

> "It does not appear that the Supreme Court has ever laid down any rules as to what cases it will review on certiorari and what it will refuse to review. If there is any classification, the Supreme Court has not declared it." *Remington Treatise on Bankruptcy, Fourth Edition, Section* 3878.

The Supreme Court should now declare for the guidance of the courts and the legal profession that the class of cases wherein the Circuit Court of Appeals obtains jurisdiction to revise and review in matter of law and in a summary way, the administrative steps in a bankruptcy proceeding will not be reviewed by the Supreme Court of the United States. Such administrative features of the Bankruptcy Act should properly be determined by the courts of Bankruptcy with supervisory revision by the Circuit Court of Appeals, making a final disposition of such matters.

Point II.

The petition for writ of certiorari should be denied because the petition fails to disclose adequate reasons for allowance of the writ.

Section 240a of the Judicial Code provides that all review of decrees of the Circuit Court of Appeals shall be taken by writ of certiorari issued by the Supreme Court. The Supreme Court has provided in Rule 38-5 Revised Rules of the Supreme Court of the United States that "A review on writ of certiorari is not a matter of

right but of sound judicial discretion and will be granted only where there are special and important reasons therefor."

The rule further provides certain reasons which, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered by the Supreme Court, as follows:

> "Rule 38-5. Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."
>
> Revised Rules of the Supreme Court of the United States, p. 32.

In addition to the reasons included in Rule 38, Revised Rules of the United States Supreme Court, the court has also laid down the general rule that certiorari is an extraordinary writ and the jurisdiction is to be used sparingly in cases of peculiar gravity and special importance. *Hamilton-Brown Shoe Co. vs. Wolf Bros. & Co.*, 240 U. S. 251 at 258. The avowed purpose of the Act of February 13, 1925 and of many prior Acts was to reduce the burdens of the Supreme Court and to transfer a large part of its appellate jurisdiction to the Circuit Courts of

Appeals. *American Construction Co. vs. Jacksonville, Tampa & Key West Ry. Co.,* 148 U. S. 372.

The first reason relied on by petitioner for allowance of a writ of certiorari is that the Circuit Court of Appeals has decided an important question of bankruptcy procedure which has not been but should be settled by the Supreme Court. Rule 38 of the Revised Rules of the U. S. Supreme Court does not include questions of bankruptcy procedure as reason for invoking the jurisdiction of the court. There are innumerable "questions of bankruptcy procedure" which might be deemed important to the litigant but none of which should be an adequate reason for granting certiorari by the Supreme Court. Any and all review as a matter of right was cut off by the Act of Febrary 13, 1925. Chapter 229, 43 Stats. L. 936.

This is a question of bankruptcy procedure reviewable by the Circuit Court of Appeals under Section 24b of the Bankruptcy Act July 1, 1898, 30 Stat. L. 553, c. 541, s. 24 as amended May 27, 1926 and should be finally decided by the Circuit Court of Appeals.

The second reason for allowance of the writ relied on by petitioner is based upon the claim that considerable uncertainty exists as to the construction to be placed upon the Amended Order 32. The decision of the Circuit Court of Appeals in the present case affirms the decision of the District Court holding that the District Judge has discretion to enter an order on the return day of a petition for discharge granting creditors who have appeared in opposition to the discharge ten days time to file specifications of their objections. In *re Lerner vs. First Wisconsin National Bank,* et al, 70 Fed. (2d) 938.

The only decision by a Circuit Court of Appeals claimed to be in conflict with the Lerner Case is *United Wall Paper Factories, Inc. vs. Hodges,* 70 Fed. (2d) 243. In that case notice was given to creditors that on May 22, 1933, the creditors must show cause why the bankrupt should not be discharged. On that day several objecting creditors appeared in opposition but did not file their specifications until May 31, 1933. No order was entered by the District Court granting additional time within which to file specifications. The bankrupt moved to strike out the specifications upon the ground that they were not filed in time and the District Judge decided that good cause had not been shown for failure to file the specifications on or before May 22, 1933. The Circuit Court of Appeals held with respect to amended General Order 32:

> "P. 244. The order, as amended, may have left power in the District Court to excuse a default; we do not find it necessary to decide, and arguendo we shall assume that it did."

Obviously the Circuit Court of Appeals in the Hodges case has merely decided that the District Judge did not abuse his discretion in declining to permit the specifications to be filed nine days after the return day. In the Lerner case the Circuit Court of Appeals has decided that the District Judge did not abuse his discretion in entering an order on the return day granting ten days time within which to file specifications and did not abuse his discretion in refusing to srike out the specifications which were filed within ten days. The cases are in harmony and not in conflict and are in harmony with a leading text writer on the subject, who states:

> "Sec. 3201. Although the express permission of former General Order 32 that the time for filing

> specifications in opposition to the discharge might be shortened or enlarged by special order of the judge was eliminated when the Supreme Court amended the General Order in 1933, yet it cannot rightly be inferred from such change that the general power of courts to grant extension of time in remedial matters is in this particular abrogated; indeed, the retention of the requirement that appearance in opposition must be entered in writing on the return day, while, at the same time, it is prescribed that specifications in writing are to be filed also on the return day, would carry the necessary implication that, on occasion, an extension of time to file the specifications might be granted; otherwise there would not be the double requirement of the entry of appearance on the return day and of the filing of the specifications on the same day, since the specifications themselves would constitute the most positive form of entry of appearance in opposition. Perhaps the expressing of the power to grant such extension was eliminated precisely because unnecessary." *Treatise on the Bankruptcy Law of the United States by Harold Remington, Fourth Edition.*

The third reason relied on by petitioner for allowance of the writ is equally insufficient. Bankrupt did not appear on the return day of the order to show cause either in person or by counsel. The application of the bankrupt for a discharge was set for hearing on November 18, 1933. The record shows without dispute that on November 17, 1933, counsel for the First Wisconsin National Bank filed written opposition to the bankrupt's discharge coupled with a motion for ten days time to file specifications (R. 3). On November 18, 1933, counsel for Jake Rakita, et al, appeared in open court and entered their appearance in opposition to the discharge of the bankrupt and requested ten days time within which to file written objections (R. 4). The

court thereupon entered an order granting objecting creditors ten days time to file specifications of objections to the discharge of said bankrupt (R. 32).

The duty of the bankrupt to be present at the hearing on November 18, 1933, appears from Section 7 of the Bankruptcy Act of July 1, 1898, 30 Stat. L. 548, c. 541, s. 7; 2 Supp. 848, which provides:

> "The bankrupt shall (1) attend the first meeting of his creditors if directed by the court or a judge thereof to do so *and the hearing upon his application for a discharge* if filed." (Italics ours)

This provision of the Bankruptcy Act is well recognized and is interpreted by one of the leading text writers as follows:

> "The bankrupt *must* present himself at the hearing upon his application for discharge, and is not permitted by absence to defeat the creditors from proving their grounds of opposition. He *must attend* without being ordered to do so; and he is not entitled to reimbursement of expenses in so doing." (Italics ours) Treatise on the Bankruptcy Law of the U. S. by Harold Remington, Fourth Edition, Sec. 3202.

This duty of bankrupt to appear at the hearing on his discharge is considered in the case of In *re Brown,* 42 F. (2d) 276, where the court quoted from various leading text writers on the subject. The District Court for the Eastern District of New York had under consideration the right of a bankrupt to be discharged from his debts if he failed to appear at the hearing on his discharge. The court came to the following conclusion at *page* 277:

> "Application for discharge denied unless the bankrupt submits to an examination within the time to be stated in the order to be entered herein."

The court also considered with approval the case of In *re Shanker,* 138 F. 862, which holds that the bankrupt has the absolute duty to attend the hearing on his application for a discharge even though not ordered to do so. The court held at *page* 864:

> "Such a hearing is not a meeting of creditors; nor is it essentially an examination of the bankrupt, although it may result in that. It is simply the occasion assigned for the trial of the issues raised by the exceptions to his discharge, in which, unlike the other proceeding subsequent to an adjudication, the bankrupt is an immediate and interested party. As such it is no hardship upon him to require that he shall be on hand to meet any demand in the way of evidence that may be made upon him . . . It follows that the bankrupt must attend before the referee at the further hearing upon his application for a discharge, on being given opportunity therefor, and that upon his failure to do so, the application must be dismissed. And it is so ordered."

In some jurisdictions this requirement that the bankrupt shall be present at the hearing on his application for a discharge is recognized by a specific rule of court on the subject which demonstrates the propriety of the requirement.

> "The propriety of this construction cannot be questioned when read in connection with Rule 14 of the Bankruptcy Rules of this court, which provides:
>
> > 'On the return day of the application for discharge or confirmation of a composition, the default of all creditors not appearing in opposition thereto shall be noted. If any appearance in opposition is filed, the bankrupt, *who must be personally present,* may be examined instanter, if desired, by the parties appearing.' (Italics ours.)

> "It is manifest, therefore, that the text authorities and the court in the case of In re Shanker, supra, have suggested the salutary and logical interpretation of the clause in question." In *re Brown,* 42 F. (2d) 276 at p. 277.

If the bankrupt had been present and had opposed the order of the District Judge extending the time to file specifications, the order granting or refusing an extension would have been binding upon the bankrupt and the objecting creditors. By not opposing said order the bankrupt has apparently acquiesced and the Circuit Court of Appeals correctly held:

> "To permit bankrupt to take advantage of an order entered upon her apparent acquiescence would be unfair." *Lerner vs. First Wisconsin National Bank,* 79 F. (2d) 938 at 939.

Point III.

The petition for certiorari should be denied because the decree entered by the Circuit Court of Appeals was clearly right.

The decree entered by the Circuit Court of Appeals was clearly right and requires no review. The District Court has jurisdiction to hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustees or other parties in interest at such time as will give the parties a reasonable opportunity to be fully heard. The applicable provision of the Bankruptcy Act of July 1, 1898, 30 Stat. L., 550, c. 541, s. 14; as amended May 27, 1926, reads as follows:

> "Section 14b. The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee

> or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard; and investigate the merits of the application and discharge the applicant, unless . . . "

Specifications of objections to the banrkupt's discharge are uniformly held to be pleadings, and are so defined in the Fourth Edition of Treatise on Bankruptcy Law of the United States by Harold Remington,

> "Sec. 3354. Specifications of objections to discharge are pleadings." Citing the following cases:
>
> In *re Abramovitz,* 253 Fed. 299.
>
> *Koch vs. Sidney Blumenthal & Co., Inc.,* 3 Fed. (2d) 395 and other cases.

The District Judge has general authority to vary the time allowed for return of process, of appearance and pleading, as specifically provided in General Order XXXVII, adopted by the Supreme Court of the United States, November 28, 1898 as amended, which reads in part as follows:

> "The judge may, by special order *in any case,* vary the time allowed for return of process, for appearance and pleading, . . . and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing." (Italics ours).

Accordingly, the District Judge merely exercised his general jurisdiction and authority as recognized by General Order XXXVII when he varied the time for filing these pleadings and granted a ten days extension. Furthermore, the time for filing pleadings is always in the control of the District Court analogous to the well-established rule that courts may enlarge the time to plead in other law suits when the time to plead is fixed by statute.

Prior to April 17, 1933, General Order XXXII provided as follows:

> "A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge." (As amended June 4, 1917.)

Under General Order XXXII as it existed prior to April 17, 1933, the Circuit Court of Appeals for the 8th Circuit had occasion to consider the construction of the General Order and determined that the District Court had power to permit the entry of appearances of creditors even after the day fixed to show cause. This case was originally reported as In *re Rerat,* 14 F. (2d) 607, where the District Court held at page 608:

> "The power of the court to extend the time for the objecting creditor to appear and plead in opposition to the discharge of the bankrupt is analogous to the well-established rule that courts may enlarge and extend the time to plead in ordinary lawsuits, when the time to plead is fixed by statute. If the court has discretionary power to extend the time to plead, when the time is fixed by statute, it seems it would also have the same power when the time is limited by a rule of court.
>
> The authorities seem unanimous to the effect that it is within the discretion of the court, for good cause shown, to extend the time within which a creditor may enter his appearance in opposition to a bankrupt's discharge, even after the expiration of the limit as provided in General Order No. 32."

And the Circuit Court of Appeals, on petition to review the order, stated that the District Court was justified in exercising its discretion, and held:

> "While the power to extend the time should be cautiously exercised, we think there was no abuse of that power here."
>
> *Rerat vs. Fisk Tire, Inc.,* 28 F. (2d) 607.

And this discretion of the District Court in the administration of General Order XXXII is upheld in In *re D. H. Stiebel & Sons,* 40 F. (2d) 637, where the Circuit Court of Appeals for the 6th Circuit held, at page 637:

> " . . . When it became apparent that his (the trustee's) authority to so act was technically defective, we think the District Court had power to entertain and allow a motion to be substituted on the part of other creditors, who had refrained from entering an appearance and filing specifications only because such act seemed vain in view of their apparent representation by the trustee. The decisions upon the point all hold the right to enlarge the time for entering appearance and filing exceptions rests in the sound discretion of the District Judge."
>
> "Nor do we think that the court below abused his discretion."

And this discretionary power in the District Court is expressly recognized in In *re Brecher,* 4 F. (2d) 1001, C.C.A. 2nd Circuit, and In *re Levin,* 176 F. 177, 99 C.C.A. 531, 1st Circuit.

On April 17, 1933, General Order XXXII was amended, effective April 24, 1933, to read as follows:

> "A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required

to show cause, and shall at the same time file a specification in writing of the grounds of his opposition."

In this bankruptcy proceeding the objecting creditors appeared on or before the time when they were required to show cause why the discharge should not be granted and applied to the court for ten days time within which to file detailed specifications of their objections. These specifications enumerated in detail the transfer of certain pieces of real estate made by the bankrupt with intent to hinder, delay and defraud the objecting creditors. If the District Court had required the specifications to be filed on November 18, 1933, the creditors could have dictated into the record general specifications which undoubtedly would have met all the criticism raised by the attorney for the bankrupt. Neither the bankrupt nor the bankrupt's counsel appeared at the hearing on November 18, 1933, to insist that specifications must be filed at that time. The court deeming that it had full jurisdiction to modify the time for filing a pleading of this sort and full authority to permit objecting creditors a short reasonable time for filing detailed specifications in proper form, entered an order in open court granting the objecting creditors ten days time within which to file specifications.

The bankrupt does not suggest that the District Court has been guilty of an abuse of discretion but claims that the District Judge had no discretion to enter the order. The order entered by the District Judge was entered within the time that creditors were required to show cause under General Order XXXII as amended. Specifications of objections are a pleading and the court extended the time for filing the pleading in accordance

with the well-known provisions of General Order XXXVII.

Suppose that a bill of complaint had been served in a plenary suit pending in the District Court, requiring defendant to file an answer within twenty days. If the defendant had appeared before the District Judge on the 19th or 20th day and obtained an ex parte order extending the time within which to serve and file an answer, it would indeed be a hardy plaintiff's counsel who would move to strike the answer upon the ground that the court did not have power nor authority nor discretion to extend the time for serving and filing a pleading.

Only two other cases have considered the effect of General Order XXXII since its amendment. The case of In *re Hodges,* 70 F. (2d) 893, and *United Wall Paper Factories vs. Hodges,* 70 F. (2d) 243, have been discussed and the ruling shown to be in conformity with the ruling in the Lerner case. The other case is In *re Corcoran,* 4 Fed. Supp. 988, decided October 16, 1933. This was a decision by the District Judge holding that where creditors did not appear prior to the return day but came in several days after the return day, the Judge did not have discretion to extend the time for opposing a discharge and filing specifications. The case is clearly distinguishable from the Lerner case.

The full beneficial effect of General Order XXXII as amended will be accomplished by the construction adopted by the District Judge and the Circuit Court of Appeals in this case. Specifications will be filed on or before the return day except when an application is made to the court on or before the return day for a short rea-

sonable extension of time within which to file the specifications. This construction of the amended general order is entirely reasonable and fair and recognizes the jurisdiction of the District Court to modify the rules of pleadings so as to facilitate the disposition of the bankrupt's petition for discharge and objections thereto if any are filed.

On December 16, 1933, the motion of the bankrupt to strike the specifications came on to be heard and was argued and submitted by counsel. The District Judge considered and reviewed his authority to make the order of November 18, 1933, and came to the conclusion that he had authority and jurisdiction to make such order. Counsel for the bankrupt did not contend that the District Judge had abused his discretion. The creditors relied upon the order of the District Judge granting a ten-day extension and prepared careful and complete specifications which were duly filed within such ten-day period.

For the foregoing reasons the respondent First Wisconsin National Bank of Milwaukee respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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FIRST WISCONSIN NATIONAL BANK
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APPENDIX

Act of February 13, 1925, Chapter 229, 43 Stat. L. 936:

> Sec. 240(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.
>
> Sec. 240(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section.

Bankruptcy Act of July 1, 1898, 30 Stat. L. 553, c. 541, s. 24a, 24b, and 25a as amended May 27, 1926:

> Sec. 24a. The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeals of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.
>
> Sec. 24b. The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in Section 25) the proceedings of the several in-

ferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said Section 25 to be allowed in the discretion of the appellate court.

Sec. 25a. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States and the Court of Appeals of the District of Columbia and to the Supreme Courts of the Territories in the following cases, to-wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of $500 or over. Such appeal shall be taken within thirty days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

Revised Rules of the Supreme Court of the United States:

Rule 38-5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in

conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

General Orders in Bankruptcy, adopted by the Supreme Court of the United States, November 28, 1898:

General Order XXXII. A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge. (As amended June 4, 1917.)

General Order XXXII. A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall at the same time file a specification in writing of the grounds of his opposition. (As amended April 17, 1933.)

General Order XXXVII. In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 292

In the Matter of MINNIE LERNER, Bankrupt

MINNIE LERNER,
Petitioner,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, WISCONSIN, JAKE RAKITA, SARAH RAKITA, HARRY BLUMENFELD and DORA BLUMENFELD,
Respondents.

BRIEF FOR RESPONDENTS, Jake Rakita, Sarah Rakita, Harry Blumenfeld, and Dora Blumenfeld, in Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW.

There was no opinion in the District Court.

The opinion of the Circuit Court of Appeals (R. 34-36) is reported in 70 F. (2d) 938.

JURISDICTION.

The interlocutory decree of the Circuit Court of Appeals was entered May 8, 1934 (R. 37). The order denying the petition for rehearing was entered June 19, 1934 (R. 38) and a stay of the mandate for ninety days was granted on June 19, 1934 (R. 38).

The jurisdiction of this court is invoked under Section 240-a of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF FACTS.

The petitioner Minnie Lerner was adjudicated a bankrupt on May 22, 1933, and on October 6, 1933, filed her petition for discharge (R. 2). Notice was given creditors setting November 18, 1933, as the day when the petition would be heard by the District Judge and creditors might show cause why the discharge should not be granted (R. 2-3). On November 17, 1933, respondent First Wisconsin National Bank of Milwaukee, duly filed a written notice of appearance in opposition to the petition for discharge and a written request to the court to extend the time to November 28, 1933, within which to file specifications (R. 3). On November 18, 1933, the respondents Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld by their counsel appeared in opposition to the discharge and requested an extension to November 28th, 1933, to file specifications of their objections (R. 3).

On November 18, 1933, the District Judge entered an order granting objecting creditors ten days' time to file specifications of objections to the discharge of said bankrupt (R. 32).

On November 28, 1933 (within the lime limited by the District Judge) written specifications of objections to the bankrupt's discharge were filed by the respondents Jake Rakita, and the other respondents, based upon the transfer by the bankrupt of several parcels of real estate with intent to hinder, delay and defraud her creditors and further based upon the fact that said bankrupt and her husband Mayr Lerner caused a corporation to be organized to which said real estate was transferred, and in consideration for which bankrupt received one hundred seventy shares of the capital stock of said corporation, with the view of placing the equities in these properties beyond the reach of creditors and with the specific intent of protecting said equities and income from said real estate from suits of creditors and from the judgment liens of these respondents. And thereafter transferred said stock to secure an existing indebtedness to the detriment of the rights of these respondents (R. 4).

On November 28, 1933 (within the time limited by the District Judge) written specifications of objections to the bankrupt's discharge were filed by the respondent First Wisconsin National Bank of Milwaukee (R. 9), and a written order granting objecting creditors until November 28, 1933, to file specifications of objections, was filed (R. 4).

On December 15, 1933, bankrupt moved to strike the specifications because the same had not been filed within the time limited by General Order XXXII (11 U. S. C. A. Para. 53), as amended April 17, 1933 (R. 11), which motion was denied by the District Court on December 16, 1933 (R. 12). The decree of the District Court was an interlocutory order which required

trial of the issues raised by the specifications filed by objecting creditors and will result in a final decree granting or denying the bankrupt's petition for discharge.

An appeal from the order denying this motion was allowed by the Circuit Court of Appeals on January 4, 1934 (R. 18). Respondents moved to dismiss the appeal (R. 29 and 31) which motions were not granted, the matter being considered on the merits (Decision R. 34). The District Court's order denying the bankrupt's motion to strike the specifications was affirmed by the Circuit Court of Appeals (R. 37). The decree of the Circuit Court of Appeals is an interlocutory decree which requires the trial of the issues raised by the specifications on file and will result in a final decree granting or denying the bankrupt's petition for discharge. A petition for rehearing was denied June 19, 1934, and a stay of the mandate for ninety days was granted (R. 38).

SUMMARY OF ARGUMENT.

The United States Supreme Court will not grant certiorari to review an interlocutory decree denying a motion to strike specifications of objections to a bankrupt's discharge. Upon denial of the petition for certiorari the District Court will hear bankrupt's petition for discharge and evidence offered in support of the specifications of objecting creditors and enter a final decree granting or denying the discharge.

The order entered by the District Court is a preliminary order in a proceding in bankruptcy, as distinguished from a controversy arising in bankruptcy proceedings.

The order was affirmed by the Circuit Court of Appeals pursuant to its jurisdiction to revise and review under Section 24b of the Bankruptcy Act, and such decision should be final.

The petition for the writ fails to disclose adequate reasons for allowance of the writ. There is no conflict among the various Circuit Courts of Appeals covering the construction of General Order XXXII as amended April 17, 1933, and the other reasons relied on by the petitioner are not within the terms of Rule 38 of the Revised Rules of the United States Supreme Court and applicable decisions.

The decree entered by the Circuit Court of Appeals was manifestly correct. On the return day several objecting creditors appeared in the District Court in opposition to the discharge, and on that day the District Judge entered an order granting ten days within which to file specifications, and these were filed within said time. The District Judge has jurisdiction to vary the time for filing specifications which are uniformly held to be pleadings. Petitioner does not claim that the District Judge abused his discretion, but relies wholly upon the proposition that the District Judge has no discretion.

ARGUMENT

POINT I.

The United States Supreme Court will not grant certiorari to review an interlocutory decree denying a motion to strike specifications to a bankrupt's discharge.

The United States Supreme Court has defined a review of certiorari in Rule 38 (5) of Revised Rules of the Supreme Court of the United States, as follows:

> "A review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor."

Petitioner has failed to make a showing that there are special or important reasons for granting the writ and further failed to set forth such reasons, if any.

The United States Supreme Court has adopted the following General Rule with respect to its jurisdiction under Sec. 240 of the Judicial Code.

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."
>
> *Hamilton Brown Shoe Co. vs. Wolf Bros. & Co.,* 240 U. S. 251, 258.

The order of the District Judge denying bankrupt's motion to strike out specifications has no finality. It does not end litigation but merely requires a trial of

the issues raised by objecting creditors' specifications and upon the close of such trial a final decree will be entered granting or denying bankrupt's petition for discharge.

The Supreme Court of the United States has held that an appeal from an interlocutory decree must be dismissed for lack of jurisdiction.

In *Arnold vs. United States,* 263 U. S. 427, the court held at page 434:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

The rule is well established that this court will not review interlocutory decrees by appeal.

Congress has from time to time passed Acts for the purpose of relieving the overburden of controversies appealable as of right to the Supreme Court. One of the most recent of these is the Act of February 13, 1925, to amend the Judicial Code, which provides in *Section 240 (c): Chapter 229, 43 Stat. L. 936:*

> "No judgment or decree of a Circuit Court of Appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

It is also respectfully submitted tha. the interlocutory decree in this matter has been entered in a proceeding in bankruptcy as distinguished from a controversy arising in bankruptcy proceedings.

> "Questions arising as to the right of the bankrupt to his discharge are not 'controversies arising in bankruptcy proceedings' but are 'proceedings in bankruptcy' themselves."
>
> *Remington on Bankruptcy,* 4th Ed. Sec. 3675.

A recent decision of this court defines a controversy arising in bankruptcy proceedings in the case of *Taylor vs. Voss,* 271 U. S. 176, 180, as follows:

> "It is now settled by the decisions of this court, that the 'controversies arising in bankruptcy proceedings' referred to in Sec. 24a, include those matters arising in the course of a bankruptcy proceeding, which are not mere steps in the ordinary administration of the bankrupt estate, but present, by intervention or otherwise distinct and separable issues between the trustee and adverse claimants concerning the right and title to the bankrupt's estate." (Citing cases.)

The order entered by the District Judge in this case was not appealable to the Circuit Court of Appeals under Sec. 25a Bankruptcy Act July 1, 1898, 30 Stat. L. 553, C 541 s 25 as amended May 27, 1926, as it is not a judgment adjudging or refusing to adjudge the petitioner a bankrupt nor is it a judgment granting or denying a discharge; nor a judgment allowing or rejecting a debt or claim of $500 or over; and, since this order is not a controversy arising in bankruptcy proceedings, it is also not appealable under Section 24a, Bankruptcy Act, 1898, as amended May 27, 1926.

It is respectfully submitted that there is only one possible theory upon which the order entered by the District Judge was appealable to the Circuit Court of Appeals and that, under the provisions of Section 24b of the Bankruptcy Act of July 1, 1898, 30 Stat. L. 553, c 541 s 24, as amended May 27, 1926. The latter section provides that the several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final to *superintend and revise* in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. It is apparent therefore, that the order entered by the Circuit Court of Appeals in this matter is merely one made pursuant to the jurisdiction of the Circuit Court of Appeals to *superintend and revise* in matter of law the proceedings of the inferior court of bankruptcy.

Respondents moved to dismiss the appeal upon the ground that the order appealed from was not final, was an order preceding a final decision, the appeal was premature, and the District Court had properly exercised its discretion. The Circuit Court of Appeals, however, held the order entered by the District Court to be appealable under Section 24b of the Bankruptcy Act of 1898 as amended May 27, 1926.

We have failed to find any case in which the Supreme Court of the United States has ever granted a writ of certiorari to review a decree entered by a Circuit Court of Appeals wherein its jurisdiction arose under Section 24b Bankruptcy Act of 1898 as amended. A leading text writer states:

> "It does not appear that the Supreme Court has ever laid down any rules as to what cases it will review on certiorari and what it will re-

fuse to review. If there is any classification, the Supreme Court has not declared it."

Remington on Bankruptcy, Fourth Edition, Section 3878.

POINT II.

The petition for writ of certiorari fails to disclose adequate reasons for allowance of the writ and should therefore be denied.

Section 240-a of the Judicial Code provides that all review of decrees of the Circuit Court of Appeals shall be taken by writ of certiorari issued by the Supreme Court. The Supreme Court has provided in Rule 38 (5) Revised Rules of the Supreme Court of the United States that "A Review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor."

The rule further provides certain reasons which, while neither controlling nor fully measuring the court's discretion, indicate the nature of reasons which will be considered by the Supreme Court.

Rule 38 (5)—(b):

"Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should

> be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."
>
> *Revised Rules of the Supreme Court of the United States*, p. 32.

The Supreme Court of the United States has also enunciated the general rule that certiorari is an extraordinary writ and the jurisdiction is to be used sparingly and only in cases of peculiar gravity and special importance. *Hamilton-Brown Shoe Co. vs. Wolf Bros. & Co.*, 240 U. S. 251 at 258.

It is patent that the purpose of the Act of February 13, 1925, and of prior Acts was to reduce the burdens of the Supreme Court and to transfer a large part of its appellate jurisdiction to the Circuit Court of Appeals. *American Construction Co. vs. Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372.

One of the rules relied upon by petitioner for allowance of the writ of certiorari, is that the Circuit Court of Appeals has decided an important question of bankruptcy procedure which should be settled by the Supreme Court. Rule 38 of the Revised Rules of the U. S. Supreme Court does not include questions of bankruptcy procedure as reasons for invoking the jurisdiction of the court. It is conceivable that many "questions of bankruptcy procedure" might be deemed important to the person affected, but none of which should be an adequate reason for granting certiorari by the Supreme Court. Respondents respectfully submit that this court should definitely state that

all questions of bankruptcy procedure which are reviewable by the Circuit Court of Appeals under Section 24b Bankruptcy Act 1898, as amended May 27, 1926, must be finally decided by the Circuit Court of Appeals and should under no circumstances be recognized as an adequate reason for invoking jurisdiction of the Supreme Court to grant a writ of certiorari.

The next reason for allowance of the writ relied on by petitioner is based upon the claim that some uncertainty exists as to the construction to be placed upon General Order XXXII as amended April 17, 1933. The decision of the Circuit Court of Appeals in the case at bar affirms the decision of the District Court on the ground that the District Court has discretion to enter an order on the return day of the petition for discharge granting creditors who have appeared in opposition to the discharge ten days' time to file specifications of their objections. *In re Lerner vs. First Wisconsin National Bank, et al.,* 70 F. (2d) 938.

The only decision of the Circuit Court of Appeals claimed to be in conflict with the *Lerner* case is *United Wall Paper Factories Inc. vs. Hodges,* 70 F. (2d) 243. In the latter case notice was given to creditors that on May 22, 1933, the creditors must show cause why the bankrupt should not be discharged. On that day several objecting creditors appeared in opposition but did not file their specifications until May 31, 1933. No order was entered by the District Court granting additional time within which to file specifications. The bankrupt moved to strike out the specifications on the ground that they were not filed in time and the Dis-

trict Judge decided that good cause had not been shown for failure to file specifications on or before May 22, 1933. The Circuit Court of Appeals held with respect to General Order XXXII, as amended, at page 244:

> "The order, as amended, may have left power in the District Court to excuse a default; we do not find it necessary to decide, and arguendo we shall assume that it did."

It is apparent that the Circuit Court of Appeals in the *Hodges* case has merely decided that the District Judge did not abuse his discretion in declining to permit the specifications to be filed nine days after the return day. In the *Lerner* case, the Circuit Court of Appeals has decided that the District Judge did not abuse his discretion in entering an order on the return day granting ten days' time within which to file specifications, and did not abuse his discretion in refusing to strike out the specifications which were filed within ten days, the period allowed by the order. It is respectfully submitted that the cases are not in conflict but are in harmony with what a leading text writer on the subject of Bankruptcy says:

> "Sec. 3201. Although the express permission of former General Order 32 that the time for filing specifications in opposition to the discharge might be shortened or enlarged by special order of the judge was eliminated when the Supreme Court amended the General Order in 1933, yet it cannot rightly be inferred from such change that the general power of courts to grant extension of time in remedial matters is in this particular abrogated; indeed, the retention of the requirement that appearance in opposition must be entered in writing on the return day, while, at the same time, it is prescribed that

> specifications in writing are to be filed also on the return day, would carry the necessary implication that, on occasion, an extension of time to file the specifications might be granted; otherwise there would not be the double requirement of the entry of appearance on the return day and of the filing of the specifications on the same day, since the specifications themselves would constitute the most positive form of entry of appearance in opposition. Perhaps the expressing of the power to grant such extension was eliminated precisely because unnecessary." *Remington on Bankruptcy,* Fourth Edition, Section 3201.

The third reason relied on by petitioner for allowance of the writ is equally insufficient. Bankrupt did not appear on the return day of the order to show cause either in person or by counsel. The application of the Bankrupt for a discharge was set for hearing on November 18, 1933. In this connection it is respectfully submitted that the duty of the Bankrupt to be present at this hearing is specifically imposed by Section 7 of the Bankruptcy Act of 1898, 30 Stat. L. 548; c 541 s 7; 2 Supp. 848, which provides:

> "The bankrupt shall (1) attend the first meeting of his creditors if directed by the court or a judge thereof to do so *and the hearing upon his application for a discharge if filed*" (Italics ours).

The provision of the Bankruptcy Act just cited is well recognized and has been interpreted as follows:

> "The bankrupt *must* present himself at the hearing upon his application for discharge, and is not permitted by absence to defeat the creditors from proving their grounds of opposition. He *must attend* without being ordered to do so;

and he is not entitled to reimbursement of expenses in so doing" (Italics ours).

Remington on Bankruptcy, 4th Ed. Sec. 3202.

This duty of the bankrupt to appear at the hearing on his application for discharge was before the court in the case of *In re Shanker,* 138 F. 862, in which it was held on page 864:

> "Such a hearing is not a meeting of creditors; nor is it essentially an examination of the bankrupt, although it may result in that. It is simply the occasion assigned for the trial of the issues raised by the exception to his discharge, in which, unlike the other proceedings subsequent to an adjudication, the bankrupt is an immediate and interested party. As such it is no hardship upon him to require that he shall be on hand to meet any demand in the way of evidence that may be made upon him. * * * It follows that the bankrupt must attend before the referee at the further hearing upon his application for a discharge, on being given opportunity therefor, and that upon his failure to do so, the application must be dismissed. And it is so ordered."

And thus the court also held in approving the decisions of the case above cited, that:

> "It is manifest, therefore, that the text authorities and the court in the case of In re Shanker, supra, have suggested the salutary and logical interpretation of the clause in question." *In re Brown,* 42 F. (2d) 276 at p. 277.

If the bankrupt had been present and had opposed the Order of the District Judge extending the time to file specifications, the Order granting or refusing an extension would have been binding upon the bankrupt

and the objecting creditors. And if the court had refused to extend the time, upon objection raised by the bankrupt, objecting creditors would have had an opportunity to file written specifications on the day in question. By not opposing said order the bankrupt has apparently acquiesced and the Circuit Court of Appeals correctly held:

> "To permit bankrupt to take advantage of an order entered upon her apparent acquiescence would be unfair." *In re Lerner,* 70 F. (2d) 938 at 939.

POINT III.

The petition for certiorari should be denied because the decree entered by the Circuit Court of Appeals was manifestly correct.

The District Court has jurisdiction to hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustees or other parties in interest at such time as will give the parties a reasonable opportunity to be fully heard. *Section 14 b, Bankruptcy Act of 1898, as amended May 27, 1926.*

Specifications of objections to the bankrupt's discharge are uniformly held to be pleadings, and are so defined in *Section 3354, Remington on Bankruptcy,* 4th Ed., in which the writer states as follows:

> "Specifications of objections to discharge are pleadings." Citing the following cases:
>
> *In re Abramovitz,* 253 F. 299;
>
> *Koch vs. Sidney Blumenthal & Co. Inc.,* 3 F. (2d) 395 and other cases.

The District Judge has general authority to vary the time allowed for return of process, of appearance and pleadings, as specifically provided in General Order XXXVII which reads in part as follows:

> "the judge may, by special order *in any case,* vary the time allowed for return of process, for appearance and pleading * * * and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing" (Italics ours).

It is therefore submitted that the District Court in the case at bar merely exercised its general jurisdiction and authority as recognized by General Order XXXVII when it entered an order extending the time for filing the specifications. It is also submitted that the time for filing pleadings is wholly in the control of the District Court since the rule is well established that trial courts may enlarge the time to plead when such time to plead is fixed by statute.

Under General Order XXXII as it existed prior to April 17, 1933, the Circuit Court of Appeals for the 8th Circuit had occasion to consider the construction of the General Order and determined that the District Court had power to permit the entry of appearances of creditors even after the day fixed to show cause, and the court in the case of: *In re Rerat,* 14 F. (2d) 607, held at page 608:

> "The power of the court to extend the time for the objecting creditor to appear and plead in opposition to the discharge of the bankrupt is analogous to the well-established rule that courts may enlarge and extend the time to plead in ordinary lawsuits, when the time to plead is fixed by statute. If the court has discretion-

ary power to extend the time to plead, when the time is fixed by statute, it seems it would also have the same power when the time is limited by a rule of court.

"The authorities seem unanimous to the effect that it is within the discretion of the court for good cause shown, to extend the time within which a creditor may enter his appearance in opposition to a bankrupt's discharge, even after the expiration of the limit as provided in General Order No. 32."

And the Circuit Court of Appeals, on petition to review the order, stated that the District Court was justified in exercising its discretion, and held:

"While the power to extend the time should be cautiously exercised, we think there was no abuse of that power here." *Rerat vs. Fisk Tire Inc.*, 28 F. (2d) 607.

This discretion of the District Court in the administration of General Order XXXII as amended June 4, 1917, is upheld in a decision by the Circuit Court of Appeals for the 6th Circuit in the following language:

"* * * When it became apparent that his authority to so act was technically defective, we think the District Court had power to entertain and allow a motion to be substituted on the part of other creditors, who had refrained from entering an appearance and filing specifications only because such act seemed vain in view of their apparent representation by the trustee. The decisions upon the point all hold the right to enlarge the time for entering appearance and filing exceptions rests in the sound discretion of the District Judge." *In re: D. H. Stiebel & Sons*, 40 F. (2d) 637.

This discretionary power in the District Court was also recognized in the following cases:

In re: Brecher, 4 F. (2d) 1001, C. C. A. 531, 2nd Circuit.

In re: Levin, 176 F. 177, 99 C. C. A. 531, 1st Circuit.

In view of the undisputed fact that neither petitioner nor her attorney were present at the time set for the hearing of her petition for discharge and objecting creditors having appeared and having requested a short extension of time within which to file their specifications and objections in detail, and the bankrupt not having objected thereto, it is submitted that the District Judge was within his discretion to grant the order which is complained of by bankrupt.

Only two other cases have considered the effect of General Order XXXII, since it was amended on April 17, 1933. The case of *In re Hodges,* 70 F. (2d) 893, and *United Wall Paper Factories vs. Hodges,* 70 F. (2d) 243. And the ruling shown to be in harmony with the *Lerner* case. The other case is *In re Corcoran,* 4 Fed. Supp. 988, decided Oct. 16, 1933. This was a decision by the District Judge holding that where creditors did not appear prior to the return day but came in several days after the return day, the Judge would not have discretion to extend the time for opposing a discharge and filing specifications. This case is clearly distinguishable from the case at bar.

CONCLUSION.

If petitioner's interpretation of the amended order was to be given effect, it would, in many cases, work a great injustice. As happens frequently, creditors

appear in person on the return day pursuant to notice and orally state that they object to bankrupt's discharge. There is nothing in the notice requiring them to retain counsel or file written specifications on the return day. They are in a Court of Equity and expect that they will have an opportunity to assist in preventing an undeserving bankrupt from obtaining the benefits of the Bankruptcy Act—the court tells them they may have several days (usually ten) within which to retain counsel or themselves file written specification of their objections. How can the bankrupt be prejudiced by such procedure? If he is innocent of the acts charged as the basis of the objection he will be discharged, if he is guilty of them he ought not to be. On the other hand, to contend that the trial court has no discretion in this situation would be to use the regulation to assist those who are not entitled to the beneficent provisions of the Bankruptcy Act.

For the foregoing reasons the respondents Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld, respectfully submit that the petition for writ of certiorari should be denied.

September 7, 1934.

Respectfully submitted,

WALTER J. MATTISON,
208 E. Wisconsin Ave.,
Milwaukee, Wisconsin,
Counsel for Respondents, Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld of Milwaukee.

BEN Z. GLASS,
152 W. Wisconsin Ave.,
Milwaukee, Wisconsin.
Of Counsel.

APPENDIX.

Act of February 13, 1925, Chapter 229, 43 Stat. L. 936:

Sec. 240 (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

Sec. 240 (c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section.

Bankruptcy Act of July 1, 1898, 30 Stat. L. 553, c 541, s 24a, 24b and 25a, as amended May 27, 1926:

Sec. 24a. The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeals of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

Sec. 24b. The several circuit courts of appeal and the Court of Appeals of the District of

Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in Section 25) the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said Section 25 to be allowed in the discretion of the appellate court.

Sec. 25a. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States and the Court of Appeals of the District of Columbia and to the Supreme Courts of the Territories in the following cases, to-wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of $500 or over. Such appeal shall be taken within thirty days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

Revised Rules of the Supreme Court of the United States:

Rule 38-5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: * * * (b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an impor-

tant question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

General Orders in Bankruptcy adopted by the Supreme Court of the United States November 28, 1898:

General Order XXXII. A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge. (As amended June 4, 1917.)

General Order XXXII. A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall at the same time file a specification in writing of the grounds of his opposition. (As amended April 17, 1933.)

General Order XXXVII. In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for en-

forcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

30

SUPREME COURT OF THE UNITED STATES.

Nos. 292 and 496.—October Term, 1934.

Minnie Lerner, Petitioner, 292 *vs.* First Wisconsin National Bank of Milwaukee, Wisconsin, Jake Rakita, Harry Blumenfeld, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
Lawyers County Trust Company, Petitioner, 496 *vs.* William Reichert and Paul Kollmar, Individually and as Co-partners trading under the name of W. Reichert & Co.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 4, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

These causes require consideration of General Order in Bankruptcy No. XXXII, as amended, effective April 24, 1933. This Order, as it stood before that day, and the amendments then adopted, follow. Deleted words are within the brackets; words added are italicized.

"XXXII. Opposition to Discharge or Composition *or extension.*

"A creditor opposing [the] *an* application [of a bankrupt] for [his] discharge, or for the confirmation of a composotion *or extension proposal,* shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall *at the same time* file a specification in writing of the grounds of his opposition [within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge].

Whether, under the amended order, Bankruptcy Courts may permit a creditor opposing an application for discharge to file

written specifications showing the grounds of his opposition after "the day when creditors are required to show cause", is the question for determination.

In No. 292 the Circuit Court of Appeals, Seventh Circuit, held that when good cause is shown, such an extension may be granted. In No. 496 the Circuit Court of Appeals, Second Circuit, ruled to the contrary. The latter court, we think reached the proper conclusion. Reversal of the challenged judgment must follow in No. 292; affirmance in No. 496.

The purpose of the 1933 amendments to Order No. XXXII was to prevent continuation of abuses then apparent.

The so-called "Donovan Report", March 22, 1930, on "Administration of Bankrupt Estates", printed (1931) for the House Judiciary Committee, 71st Congress, 3rd Session, p. 116, stated:

> "An unscrupulous creditor who desires to get something more than the others may be tempted to file a notice of appearance (a simple 4-line document) at the time of the hearing on confirmation, knowing that this will hold up the entire proceeding for at least another ten days even if he does not follow up the notice of appearance with detailed specifications of objection. During this 10-day period he may hope to get paid off by the bankrupt. If the bankrupt refuses or is unable to strike a bargain, the creditor may then file his specifications of objection, so that the bankrupt will face another three weeks' delay, during the process of which he may be finally induced to come to terms".

Reporting on "Bankruptcy Law and Practice", (Dec. 8, 1931), Senate Document No. 65, 72nd Congress, 1st Session, (p. 16), the Attorney General asserted:

> "The clerks of 72 district courts reported to us that out of the 49,928 cases closed by them in the fiscal year 1930, 27,426 applications for discharge had been disposed of.
>
> "In only 1,042 of these cases individual creditors at the time of the hearing before the judge on the bankrupt's application filed notices of appearance stating that they intended to oppose the discharge. Under General Order XXXII, these creditors were then required to file specifications in writing within 10 days, setting forth the grounds of this opposition, upon the filing of which the issues would be tried.

"But in 330 of these 1,042 cases the creditors did not follow up their notices of appearance by filing written specifications. Why?

"Presumably, because the creditors were either bought off by the bankrupt as already described, or because indifferent, or were unwilling to incur further expense. . . ."

By memorandum of April 3, 1933, submitted to us, Solicitor General Thacher, who had devoted much time and thought to bankruptcy proceedings, suggested certain amendments and additions to the General Orders—among them, those to No. XXXII adopted as above shown. After referring to the passages from Congressional publications, which we have quoted, he declared:

"For these reasons it is recommended with respect both to discharges and to compositions that the specifications of opposition should be filed with the appearances. Ample time is afforded by the Act to opposing parties to obtain their evidence and make up their minds. Under Section 58 creditors must be given at least 30 days' notice of all applications for discharge, and may after receipt of the notice, if they have not done so already, examine the bankrupt and other parties under Section 21 (a). Under compositions creditors may examine the bankrupt or debtor at the first meeting and at any time thereafter under section 21 (a), and must be given at least ten days' notice of the application for confirmation."

Having considered the facts, thus brought to our attention, and those otherwise known, it seemed proper to adopt the suggested amendment to Order XXXII.

The language of the amended Order is mandatory; it is controlling in circumstances like those here presented; strict compliance should be accorded. Under Order XXXVII, and permissive provisions of the Bankruptcy Act, we think the courts may exercise discretion sufficient for the successful conduct of proceedings in varying circumstances. Thus, while an objecting creditor must file specifications showing the grounds of his opposition on the day when creditors are required to show cause, that day may be fixed or postponed by the court in view of the existing situation.

No. 496 Affirmed.
No. 292 Reversed.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 496

LAWYERS COUNTY TRUST COMPANY,
PETITIONER,

vs.

WILLIAM REICHERT AND PAUL KOLLMAR, INDIVIDUALLY AND AS CO-PARTNERS TRADING UNDER THE NAME OF W. REICHERT & CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of WILLIAM REICHERT and PAUL KOLLMAR, Individually and Trading Under the Firm Name of W. REICHERT & Co., Alleged Bankrupts

PETITION FOR INVOLUNTARY BANKRUPTCY

To the Honorable Judges of the District Court of the United States, for the Southern District of New York:

The petition of the County Trust Company of New York, Nyamco Associates, Inc., and Republic Storage Co., Inc., respectfully shows, upon information and belief:

1. The said William Reichert and Paul Kollmar are and have been co-partners doing business under the firm name and style of W. Reichert & Co. for the greater portion of the six months next immediately preceding the date of the filing of this petition and had their place of business and resided in the Southern District of New York, to wit: They had their place of business at No. 15 West 37th Street, in the Borough of Manhattan, in the City of New York. The said William Reichert resided at 70 Fenimore Road, Mamaroneck, N. Y., and the said Paul Kollmar resided at 41 Bon Air Avenue, New Rochelle, N. Y.

[fol. 2] 2. The said William Reichert and Paul Kollmar are neither wage earners nor persons engaged chiefly in farming or in the tillage of the soil but are in the jewelry business.

3. The said William Reichert, Paul Kollmar and the firm of W. Reichert & Co. are insolvent and owe debts to the amount of more than one thousand ($1,000) dollars, to wit: more than thirty-five thousand ($35,000) dollars.

4. Your petitioners are creditors of the said William Reichert and Paul Kollmar composing the partnership firm of W. Reichert & Co. and of the firm of W. Reichert & Co. and have provable claims against them amounting, in the aggregate (in excess of securities held by them), to upwards of $3,019.18.

5. Your petitioners are not entitled to priority upon their said claims within the meaning of the Bankruptcy Act of 1898 (as amended from time to time) nor have your petitioners received preferences within the meaning of the said Act.

6. The nature and amount of your petitioners' claims are as follows:

(a) The claim of the County Trust Company of New York is based upon a promissory note made, executed and delivered by the said William Reichert and Paul Kollmar, composing the partnership firm of W. Reichert & Co., to the County Trust Company of New York, for value, in the sum of $5,200, which has been reduced to $3,019.18. The said note was dated December 21, 1931, and matured February 10, 1932.

[fol. 3] (b) The claim of the Nyamco Associates, Inc. is for rent in the amount of $1,579.88. The claim arises as follows: The owner of the premises No. 15 West 37th Street, New York City, was the Carnelian Trading Corp. The alleged bankrupts did not pay any rent for October, November and December, 1932, or January and February, 1933. And there was a balance for July, 1932, of $125 and a balance for September, 1932, of $200 and an electric light bill of $3.57 and protest fees on a note of $1.33, making in the aggregate $1,579.88. The rents were assigned to the Nyamco Associates, Inc. No part of the said sum of $1,579.88 has been paid.

(c) The claim of the petitioner, the Republic Storage Co., Inc., is for storage of 86 cases of goods, wares and merchandise at the petitioner's place of business, to wit: No. 541 West 34th Street, in the Borough of Manhattan, in the City of New York, from July, 1932, to and including February, 1933, at the agreed rate of $5 per month, making in the aggregate $45.

7. Within the four months next immediately preceding the filing of this petition, the said alleged bankrupts were and still are, insolvent, and while so insolvent committed acts of bankruptcy as follows:

(a) On or about October 18, 1932, the said alleged bankrupts, being then insolvent, made a general assignment for the benefit of their creditors to Elmer Levenson.

(b) During the said period of four months and while so insolvent as aforesaid, the said alleged bankrupts trans-
[fol. 4] ferred a portion of their property to certain of their creditors with intent to prefer those creditors over their other creditors. Those preferences consisted of payments to the following named creditors for the amounts set opposite their respective names:

Name	Amount
Mrs. Johanna Reichert	$600
Mrs. Paul Kollmar	700
Meyer Marlow	500

9. In filing this petition in bankruptcy, your petitioners reserve the right to proceed against the said alleged bankrupts on the claim that the alleged bankrupts obtained property and credit from the petitioners by fraud and deceit.

Wherefore, your petitioners pray that service of this petition, with a subpœna, may be made upon the said alleged bankrupts, as provided by the Bankruptcy Act, and that the said alleged bankrupts may be adjudged bankrupts within the purview of the said Act.

Dated, New York, February 16, 1933.

County Trust Company of New York, by John J. Spillane, Assistant Treasurer. Nyamco Associates, Inc., by George T. Ritchings, President. Republic Storage Co., Inc., by D. C. Griffith, Petitioners.

[fols. 5 & 6] *Duly sworn to by John J. Spillane, George T. Ritchings and D. C. Griffith. Jurats omitted in printing.*

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO PETITION

To the Honorable Judges of the District Court for the Southern District of New York.

William Reichert and Paul Kollmar, the alleged bankrupts herein, by their attorney, Meyer Marlow, Esq., for

[fol. 8] their answer to the involuntary petition in bankruptcy herein, respectfully show to this Court and allege:

First: Deny each and every allegation contained in subparagraph (b) of paragraph "7" of the petition.

Second: For an affirmative defense, the alleged bankrupts herein allege as follows:

That the petitioning creditors and each of them consented and assented to the making, delivery and filing of the general assignment for the benefit of creditors heretofore executed by the alleged bankrupts and which is an act of bankruptcy alleged in the involuntary petition in bankruptcy herein, and that they consented and assented that the estate of the alleged bankrupt be administered by the assignees under and by virtue of said general assignment and in accordance with the terms thereof and of the provisions of the Debtor And Creditor Law of the State of New York, and participated in the proceedings taken by virtue of said assignment, and that by reason of the laches of the petitioning creditors and each of them in the filing of the petition in bankruptcy herein, and that by reason of all of the aforesaid the petitioning creditors and each of them are estopped from alleging and may not complain of the said general assignment for the benefit of creditors and cannot assert that the same constitutes an act of bankruptcy under the National Bankruptcy Act as amended.

Wherefore, the alleged bankrupts demand judgment dismissing the involuntary petition in bankruptcy, together [fol. 9] with the costs of this proceeding.

Dated, New York, March 2nd, 1933.

William Reichert. Paul Kollmar.

Duly sworn to by William Reichert and Paul Kollmar. Jurats omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR LEAVE TO FILE INTERROGATORIES

SIR:

Please take notice that upon the annexed petition of Paul Kollmar, one of the alleged bankrupts herein, the

[fol. 11] proposed interrogatories annexed hereto marked Exhibit "A", and upon the pleadings herein, and upon all the papers and proceedings herein, the undersigned will move this Court at a Stated Term for motions to be held at the Post Office and Federal Building in the Borough of Manhattan, City of New York, on the 5th day of April, 1933, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as Counsel can be heard, for an order allowing the alleged bankrupts to file interrogatories in accordance with said Exhibit "A" to be answered by the petitioning creditors; to wit: County Trust Co. of New York, Nyamco Associates, Inc., and Republic Storage Co., Inc., in accordance with Equity Rule LVIII, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, March 30th, 1933.

Yours, etc., Meyer Marlow, Attorney for Alleged Bankrupts, Office & P. O. Address, 225 West 34th St., Borough of Manhattan, New York City.

To Saul S. Myers, Esq., Attorney for Petitioning Creditors, 60 Wall Street, New York City.

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF PAUL KOLLMAR FOR LEAVE TO FILE INTERROGATORIES

To the Honorable Judges of the District Court for the Southern District of New York:

The petition of Paul Kollmar respectfully shows to this Court:

First: That on or about February 18, 1933, an involuntary petition in bankruptcy was filed herein by County Trust Company of New York, Nyamco Associates, Inc., and Republic Storage Co., Inc.

Second: That the acts of bankruptcy alleged in said petition is the making and filing of an assignment for the benefit of creditors on or about October 18, 1932, and the transfer of property by the alleged bankrupts alleged to have created preferences.

Third: That on or about March 2, 1933, the alleged bankrupts herein served and filed an answer to such involuntary

petition, in which they deny the alleged preferences. The [fol. 13] said answer, however, admits the making and filing of the general assignment for the benefit of creditors, but sets up as a special defense that the petitioning creditors had consented and assented to the administration of the bankrupts' estate under a general assignment for the benefit of creditors, and participated in the proceedings taken by virtue of said assignment, and that by reason thereof they are estopped from alleging, and cannot assert, that the making of the general assignment constitutes an act of bankruptcy.

Fourth: The said involuntary petition in bankruptcy is verified by John J. Spillane, as Assistant Treasurer of the County Trust Company of New York, by George T. Ritchings, as President of Nyamco Associates, Inc., and by D. C. Griffith, as President of Republic Storage Co., Inc.

Fifth: That the alleged bankrupts desire to file the interrogatories hereto annexed, marked Exhibit "A", to be answered by the respective persons aforementioned, and request an order under Equity Rule LVIII allowing your petitioner to file such interrogatories to be so answered.

Sixth: That the said answers sought to be elicited by said interrogatories are material to the special defense set forth in the answer filed by the alleged bankrupts as aforesaid and will assist and aid the alleged bankrupts in preparing their proof under said special defense. That the information sought is peculiarly within the knowledge of the peti- [fol. 14] tioning creditors. That the letters and notices which are requested to be attached to the answers to the interrogatories are not in the possession of the alleged bankrupts, but are in the possession of the petitioning creditors. Finally, the production of this proof by the petitioning creditors will substantially shorten the trial of the issues.

Wherefore, petitioner prays that an order be made herein allowing them to file such interrogatories to be answered as aforesaid.

Dated, New York, March 30th, 1933.

Paul Kollmar, Petitioner.

Duly sworn to by Paul Kollmar. Jurat omitted in printing.

[fol. 15] EXHIBIT "A" TO PETITION

1. Did you or your Company receive from Elmer Levenson as assignee of the alleged bankrupt herein, or from Goldman & Frier, the attorneys for the said assignee, notices that he would sell the assets assigned to him by the said alleged bankrupts? If the answer is in the affirmative, please attach hereto the original or copy of said notice.

2. Did you or your Company receive from the said Elmer Levenson or his said attorneys, notices or letters requiring creditors to file their claims against the assignor in verified form? If your answer is in the affirmative, please attach hereto the original or copy of said letters or notices.

3. Did you or your Company receive letters or notices from the said assignee or his attorneys, or from either of them, other than those hereinabove referred to or requested? If your answer is in the affirmative, please attach hereto the originals or copies of such letters or notices.

4. Did you or your Company file statements of claim in the assignment proceeding with the said assignee or his attorneys, or with any other person, firm, company or organization? If your answer is in the affirmative, please state with whom such statement of claim was filed and when same was filed; and if more than one statement of claim was filed give the particulars as to when and with whom each was filed.

[fol. 16] 5. Did you or your Company file a verified proof of claim in the assignment proceeding with the said assignee or his attorneys, or either of them, or with any other person, firm, Company or organization? If your answer is in the affirmative please state with whom such verified proof of claim was filed and when same was filed, and if more than one proof of claim was filed give the particulars concerning when and with whom each was filed.

6. Did you or your Company or any attorney or person on your behalf send any letters or notices in addition to the aforesaid proofs of claim and statements of claim to the assignee or his attorneys, concerning the administration of the assigned estate? If your answer is in the affirmative, please state when and to whom said notices or

letters were sent and please attach hereto copies of such letters or notices.

You are required to answer each of the foregoing interrogatories under oath.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF SAUL S. MYERS

STATE OF NEW YORK,
County of New York, ss:

Saul S. Myers, being duly sworn, deposes and says:

(1) I am the attorney herein for the petitioning creditors. I am making this affidavit because I have had personal charge of this bankruptcy proceeding from the beginning, and I am acquainted with the facts.

(2) The petition in bankruptcy was filed herein on February 18, 1933. It was filed by the County Trust Company of New York, with a claim of $3,019.18, by the Nyamco Associates, Inc. (a subsidiary of the New York Title & Mortgage Company), with a claim of $1,579.88 and by the Republic Storage Co., Inc., with a claim of $45.00.

[fol. 18] (3) The alleged bankrupts' answer admits the entire petition in bankruptcy with the exception of paragraph 7, subd. (b). That is a denial of certain preferential payments but that allegation and that denial are immaterial on this motion in view of the fact that the alleged bankrupts expressly admit an act of bankruptcy by the making of a general assignment for the benefit of their creditors.

(4) Upon the coming in of the answer, Judge Coxe on March 27, 1933, made an order referring to Mr. Coffin, as Special Master, the issues raised by the said petition and the said answer, for hearing and report; but the alleged bankrupts have taken no steps to bring those issues to trial. On the contrary, they have done everything except try the issues, all in violation of Rule 12 of the Rules of the Southern District of New York.

(5) The only issue raised by the said petition and the said answer is an alleged affirmative defense as follows: The alleged bankrupts say that the petitioning creditors "and each of them" consented to the said assignment for the benefit of creditors and assented that the estate of the alleged bankrupts be administered by the assignee under the Debtor and Creditor Law of the State of New York and "participated in the proceedings taken by virtue of said assignment," and that each one of the petitioning creditors is now estopped from proceeding in bankruptcy.

(6) I am satisfied so far, at least, as the County Trust Company of New York is concerned, that that petitioning [fol. 19] creditor never consented to the said assignment for the benefit of creditors, never assented that the estate of the alleged bankrupts be administered by the assignee and never participated in the assignment proceedings in any manner.

(7) I have had charge of this claim on behalf of the County Trust Company of New York since February, 1932. First, the alleged bankrupts secured an extension of time from their creditors and made some payments on account. These payments reduced the claim of the County Trust Company of New York from $5,200 to $3,019.18. Then, on or about October 18, 1932, the alleged bankrupts made an assignment for the benefit of creditors and have attempted to have their affairs wound up by a friendly assignee in violation of the spirit and intent of the National Bankruptcy Act of 1898 as amended from time to time. Neither the County Trust Company of New York nor I filed any claim in that assignment proceeding nor participated in it in any manner. I annex hereto the affidavit of John J. Spillane, Esq., Assistant Treasurer of the County Trust Company of New York.

(8) If, therefore, the petition in bankruptcy is good so far as concerns the County Trust Company of New York, I respectfully submit that an adjudication in bankruptcy must follow as a matter of course on the said petition and on the said answer regardless of any steps taken by the other two petitioning creditors in the manner claimed by the alleged bankrupts in their answer herein. If the contention of the alleged bankrupts in their answer be correct, [fol. 20] then all creditors with the exception of the County

Trust Company of New York have become parties to the assignment proceeding and are not such creditors as may file or join in a petition in bankruptcy or reap the benefits of such a petition in bankruptcy. The order of reference of Judge Coxe of March 27, 1933, should therefore, I respectfully submit, be recalled for the reason that a reference is wholly unnecessary and would result in an unwarranted expense to the petitioning creditors and an order of adjudication should be entered forthwith and the proceeding referred to Mr. Coffin as Referee in the usual manner. The alleged bankrupts have not given any indemnity for the expenses of the reference as required by Rule 12 of the Rules of the Southern District of New York.

(9) The reason for the filing of the petition in bankruptcy is this: No dividends appear to be available for the creditors in the said assignment proceeding. The County Trust Company of New York has not received any information in respect of the value of the estate nor the extent of the liabilities nor the allowances or proposed allowances to the assignee, his attorneys, accountants, auctioneers, etc. But I do know that on or about February 23, 1932, the alleged bankrupts verbally informed deponent that their assets totalled $84,014.35; and that the principal items were Cash in bank $2,119.37, Receivables (good) $43,385.98 and Inventory $37,493.75. I also say that on March 8, 1933, Joseph Frier, the attorney for the assignee, Elmer Levenson, informed me that the assets only amounted to $5,200 and that all the assets had been reduced to cash. [fol. 21] An examination of the papers in the said assignment proceeding by me justifies me in stating to this court that that proceeding requires a thorough investigation in this proceeding. The statement of W. Reichert & Co. to the County Trust Company of New York as the basis of credit, dated December 31, 1931, is as follows:

W. Reichert & Co.

Statement of Financial Condition December 31, 1931

Assets

Current Assets—	
Cash in banks	$ 2,119.37
Cash on hand	16.91
Customers' accounts receivable (good)	43,385.98

Customers' notes receivable	$3,565.95		
Less: Notes discounted	2,567.61		
		998.34	
Merchandise inventory (cost or market, the lower)		37,493.75	
			$84,014.35
Other Assets—			
Furniture, fixtures & equipment	$9,010.81		
Less: Reserve for depreciation	5,964.21		
		$3,046.60	
Advances to salesmen on commission accounts		9,450.31	
			12,496.91
Total Assets			$96,511.26

[fol. 22] Liabilities & Capital

Current Liabilities—			
Notes payable to banks		$15,200.00	
Notes payable to others		2,050.00	
Accounts payable for merchandise		21,086.51	
			$38,336.51
Other Liabilities—			
Loans payable (partners' relatives)			$ 7,060.00
Total Liabilities			$45,396.51
Capital			51,114.75
Total Liabilities & Capital			$96,511.26

(10) So far as the proposed interrogatories are concerned, the County Trust Company of New York has answered the same by the annexed affidavit of John J. Spillane, Esq.

Saul S. Myers.

Sworn to before me, this 20th day of June, 1933. Rose M. Silich, Notary Public. N. Y. County Clerk's No. 238. N. Y. Register's No. 4S967. Commission expires March 30, 1934.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN J. SPILLANE

STATE OF NEW YORK,
County of New York, ss:

John J. Spillane, being duly sworn, deposes and says:

(1) I am Assistant Treasurer of the County Trust Company of New York. I have had charge of the claim of the County Trust Company of New York against the alleged bankrupts herein since at least the beginning of 1932.

(2) In reference to the proposed interrogatories: The County Trust Company of New York received a notice of sale dated October 26, 1932. The County Trust Company of New York received on January 7, 1933, a notice to file claims. The County Trust Company of New York did not receive any other letters or notices from the assignee for the benefit of creditors or his attorneys or from either of [fol. 24] them. The County Trust Company of New York did not file any statements of claim in the assignment proceeding in the State of New York either with the said assignee or with his attorneys or with any other person, firm, company or organization. The County Trust Company of New York did not file any verified proof of claim in the said assignment proceeding with the said assignee or with his attorneys or with either of them or with any other person, firm, company or organization. Neither did the County Trust Company of New York nor its attorneys nor any person on its behalf send any letters or notices to the said assignee or to his attorneys.

John J. Spillane.

Sworn to before me this 20th day of June, 1933. John C. Greller, Notary Public, Queens County. Queens Co., Clks. No. 628, Reg. No. 4598. N. Y. Co., Clks. No. 79, Reg. No. 5-G-38. Commission expires March 30, 1935. (Seal.)

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING LEAVE TO FILE INTERROGATORIES

The alleged bankrupts having moved for leave to file interrogatories,

Now, on reading and filing the notice of motion of the alleged bankrupts, dated March 30, 1933, and the petition of Paul Kollmar, one of the alleged bankrupts, verified March 30, 1933, in support thereof, and

On reading in opposition thereto the affidavits of Saul S. Myers and John J. Spillane, each sworn to June 20, 1933, and

After hearing Stanley M. Dorman, Esq., of counsel for the alleged bankrupts in support of the motion and Joseph K. Guerin, Esq., of counsel for the petitioning creditors in opposition, it is

Ordered that the said motion be and it hereby is in all respects denied, and

It appearing from the affidavits filed in opposition to the said motion and from the answer and other papers on file herein that no substantial issue has been raised by the said answer, it is further

Ordered that the order of reference of "the issues raised by the petition in bankruptcy and the bankrupts' answer [fol. 26] herein," be vacated and that the Clerk of this Court enter an order of adjudication in the usual form.

Dated, June 24, 1933.

Alfred C. Coxe, U. S. D. J.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

In Bankruptcy

No. 56603

In the Matter of WILLIAM REICHERT and PAUL KOLLMAR, individually and as Co-partners, doing business under the firm name and style of W. Reichert & Co., Alleged Bankrupts

ADJUDICATION AND ORDER OF REFERENCE

Invol. Pet. filed Feb. 18, 1933.

Bankrupt's address: 15 West 37th St., N. Y. C.

At New York City, in said District, on the 27th day of June, A. D. 1933, before the Honorable Frank J. Coleman, Judge of the said Court in Bankruptcy, the petition of County Trust Company of New York, et al., that William Reichert and Paul Kollmar, individually and as co-partners, doing business under the firm name and style of W. Reichert & Co., be adjudged bankrupt, within the true in-
[fol. 27] tent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered and adjudication having been directed in order of Court filed June 26, 1933, the said William Reichert and Paul Kollmar, individually and as co-partners, doing business under the firm name and style of W. Reichert & Co., hereby declared and adjudged bankrupt accordingly.

And it is further ordered that the said bankrupt file schedules in triplicate as required by law within ten days from the date hereof.

And it is further ordered that the said matter be referred to Harold P. Coffin, Esq., one of the referees in bankruptcy of this Court to take all such further proceedings therein as are required by said Acts of Congress, and all such acts therein as the Court might take or perform, except such as by law or the general orders of the Supreme Court are required to be performed by the Judge; and that the bankrupt shall attend before said referee on the 1st day of July, 1933, at 10 o'clock a. m., and thenceforth shall submit to such orders as may be made by said referee or by the Court relating to said bankruptcy.

Witness the Honorable Frank J. Coleman, Judge of the said Court, and the seal thereof, at the City of New York, in said District, on the 27th day of June, A. D. 1933.

[SEAL.] Charles Weiser, Clerk.

A true copy.

Charles Weiser, Clerk.

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

SPECIFICATIONS IN OPPOSITION TO PETITION FOR DISCHARGE

Now comes Lawyers County Trust Company (formerly the County Trust Company of New York), a creditor of the above named bankrupts, and does hereby oppose the

granting to them of a discharge from their debts, and for the grounds of such opposition, does file, upon information and belief, the following specifications:

Specification No. 1

(1) The bankrupts, in violation of the National Bankruptcy Act, Sect. 14b(3), U. S. C. A. Title 11, Sect. 32b(3), obtained money on credit and extensions and renewals of credit, by making and publishing and causing to be made and published, a materially false statement in writing respecting their financial condition in the following manner:

[fol. 29] On February 20, 1931, the bankrupts obtained from the said County Trust Company of New York a loan of $10,000 by making, publishing and delivering to the said County Trust Company of New York a materially false statement in writing respecting their financial condition. The said statement was submitted on February 20, 1931, and purported to show the financial condition of the bankrupt partnership as of December 31, 1930. A copy of the said statement is hereto annexed and marked "Exhibit A."

The said statement submitted on February 20, 1931, was not true in the following particulars, among others:

(a) It was not true, as stated in the said statement, that the bankrupts had as assets an item of "Accts. Receivable (Good—not pledged) $117,389.13." The bankrupts did not at that time have good accounts receivable of the value of $117,389.13 but in truth and in fact the good receivables—not pledged—did not exceed the sum of $60,000.

(b) It was not true that at that time the bankrupts had as assets an item, "Notes Receivable (Good—not pledged) $749.72." The bankrupts did not at that time have good notes receivable unpledged in the sum of $749.72 but in truth and in fact had discounted all of their good notes receivable, and the said $749.72 of notes receivable had little, if any, value.

(c) It was not true that at that time the bankrupts had as assets an item of

[fol. 30] "Mdse. Finished, " Unfinished, " Raw } cost or market lower } 57,910.90"

The bankrupts did not have on hand at that time merchandise of the market value of $57,910.90 but in truth and in fact the true market value of the merchandise at that time was about one-half of $57,910.90.

(d) It was not true that at that time the bankrupts had as assets an item of "Furniture and Fixtures $8,955.81 less reserve of $4,162.05" but in truth and in fact the furniture and fixtures of the bankrupts had no more than junk value. The net book value of this item in February, 1932, was only $3,046.60 and that value represented the actual cost of the furniture and fixtures less depreciation since acquisition. At this time, to wit, February, 1932, this asset was several years old and its value was highly problematical.

(e) It was not true that at that time the bankrupts had as assets an item "Cash on hand $5,635.60" but had much less cash on hand the exact amount of which cannot at this time be definitely ascertained. It will require a careful examination of the books and records of the bankrupts.

(f) It was not true that at that time the bankrupts only owed as current debts $78,724.09 but in truth and in fact the bankrupts owed considerably more in the nature of current debts, the exact amount of which cannot at this [fol. 31] time be definitely ascertained. It will require a careful examination of the books and records of the bankrupts. For instance, according to the books and records of the bankrupts the partnership at that time owed additional sums of money to the extent of $7,960 to relatives of the individual bankrupts.

(g) On the said statement under the heading: "If adjustments involve important amounts, please give details below" the bankrupts stated:

"12,778.62	Partner's drawings during 1930
7,960.00	Partner's loans deducted
4,818.62	adjustment in capital."

Such information was false in the following particulars:

The financial statement (Exhibit A), indicates that the individuals partners, William Reichert and Paul Kollmar, had loaned the firm of W. Reichert & Co. $7,960. The

books of the partnership, however, show that at that time there were no outstanding loans from the partnership to the individual partners, William Reichert and Paul Kollmar. On the contrary the books showed that loans in practically that same amount had been made by the wives of the individual partners to the partnership. And the books therefore very clearly indicated that the item of $7,960 was a current debt of the partnership. And that current debt should therefore have been shown upon the statement given by the partnership to the County Trust Company of New York.

[fol. 32] In fact at no time had there been any adjustment in the capital account on the books of the bankrupts and this current indebtedness of the bankrupts was carried right down to the end of 1931 as is shown upon a written financial statement given by the bankrupts to the County Trust Company of New York in February, 1932, as of December 31, 1931. In that statement there appears among the other liabilities "Loans payable (partners' relatives) $7,060."

The statement about the partners' loans was intentionally misleading and was given to the County Trust Company of New York so as to have it appear that there were no loans to relatives of the individual bankrupts and also for the purpose of diminishing the current liabilities.

The said loan was, upon the strength of Exhibit A, renewed from time to time, to wit, on May 20, 1931, June 22, 1931, September 21, 1931 and December 21, 1931.

On December 14, 1933, the bankrupt Reichert testified before Referee Coffin at the first meeting of creditors herein as follows:

"Q. At that time there was an indebtedness, wasn't there, on the part of your firm to your wife Mr. Kollmar's wife, and Mr. Kollmar's father-in-law, which aggregated $6,060?

A. Yes.

Q. Is that so?

A. Yes.

Q. Where in this statement is there any statement regarding that indebtedness, aggregating $6,060?

A. That is not in here, that was capital at that time.

Q. I don't understand.

[fol. 33] A. We intended to repay that during the year, that $6,000. We figured it as capital.

Q. I know, but you appreciate, don't you, that when people lend money they are going to be influenced by the amount of money that the persons they are lending it to owe others?

A. Yes.

Q. And don't you realize that the amount of money that you and your partner owed members of your family respectively, which were debts of the company, were liabilities that might have influenced the County Trust Company in determining whether they would lend that $10,000 or not?

A. Our accountant stated it was perfectly all right, he said, 'If you consider that as a personal loan,' we could figure that as part of our capital.

Q. If you figured it as part of your capital, then, it could not have been a loan by members of your families. There must have been some arrangement with them whereby it was to be treated as capital of the company and not to be a loan, isn't that so?

A. We were supposed to repay that during the year.

Q. You don't answer the question. If that money was to be repaid as a loan, why doesn't it appear in here as a liability of your company?

A. Because we considered it as capital.

Q. Was it capital, not what you considered it, what was it?

A. In here it was capital.

Q. When did it cease to become capital and become an indebtedness that was to be repaid?

A. At the end of that year.

[fol. 34] Q. Who decided it?

A. We decided it.

Q. Didn't you discuss it with the people that loaned the money?

A. No.

Q. You and your partner simply changed your minds about it and decided it was to be money owed to members of your families and would have to be repaid, is that so?

A. It seems that way.

Q. Will you tell me what you mean by this item, which I find on this sheet; you have here in the statement $12,-

778.60, partners' drawing during 1930, and you have this item $7,960, partners' loan deducted, and subtracting one from the other, you have an item of $4,881.62, adjustment in capital, what do you mean by that?

A. This must be the loans—personal loans we mentioned before.

Q. The $7,960?

A. Yes."

And the bankrupt Kollmar testified:

"Q. You have heard the testimony that Mr. Reichert has just given?

A. Yes.

Q. Regarding the $10,000 loan from the County Trust Company and regarding the statement that you both signed?

A. Yes.

Q. I show you the statement and I ask you if you recognize your signature here as well?

A. Yes.

Q. Have you any explanation to make regarding the loans by members of your family and also Mr. Reichert's family, contained in here, other than the explanation made by Mr. Reichert?

A. None at all.

Q. Have you any different explanation to make than Mr. [fol. 35] Reichert made as to the item of $7,960, and setting that up as partners' loan deducted?

A. No.

Q. What is the answer?

A. No."

On December 21, 1933, the bankrupts attempted to explain away their previous testimony and the following took place before Referee Coffin at the first meeting of creditors:

"Mr. Reichert: I wish to make the following statement for the purpose of clarifying and amending the testimony given at the last hearing, in reference to certain loans made by relatives of myself.

In 1930, Mrs. Reichert lent me certain moneys which I, in turn, gave to the business immediately. This loan was made to me and not to the partnership but I presume that since the money was immediately put into the business, the

bookkeeper, without having asked me as to the method of entry of these loans, made up certain loan accounts showing these loans to have been made to the partnership itself.

When the financial statement of December, 1930, was made up, Mr. Kollmar and myself told the accountant, upon his inquiry, that such loans as were from relatives, were not actual loans payable of the partnership, but were loans to the partners who in turn had given them to the partnership as additional contributions to capital. The accountant did not list these loans from relatives, therefore, as partnership liabilities upon the balance sheet, but showed [fol. 36] these loans in the adjustment of capital as a deduction from partners' drawings during 1930 in the sum of $12,778.62. The 'partners' drawings' then represents the $6,000 annual drawings for each partner plus some traveling expenses, this item being a decrease in capital. The $7,960, partners' loans deducted item, represents the additional contributions to capital, made by both Mr. Kollmar and myself, by means of these loans from relatives.

At the time the schedules were made up, we did not know that there was any distinction made between partnership and individual creditors and, therefore, did not explain to our attorney that these loans from relations were individual debts and not partnership debts. We have been informed by our attorney of this error and will amend the schedules accordingly.

Mr. Stevenson: Do you, Mr. Kollmar, want to make a statement?

Mr. Kollmar: I wish to make a similar statement in reference to loans made by Mrs. Reichert, Mrs. Kollmar and Mr. Ponsky." (*sic* Mr. Prinsky.)

(2) Not only was the financial statement hereinabove referred to false but it was known by the bankrupts to be false at the time it was made and such statement was made by the bankrupts with the intention of having it relied on by the said County Trust Company of New York on extending the said credit and on extensions and renewals of such credit to the bankrupts; and said statement was in fact so relied upon, and such credit and extensions and [fol. 37] renewals thereof would not have been given except in reliance upon the said written statement so made by the bankrupts.

Specification No. 2

(3) The bankrupts, in violation of the National Bankruptcy Act, Sects. 14b(1) and 29b(3) U. S. C. A. Title 11 Sects. 32b(1) and 52b(3), knowingly and fraudulently, while acting as the agents, proxies and attorneys for their wives and one Morris Prinsky (father of Mrs. Paul Kollmar) presented under oath in this proceeding proofs of debt against the estate herein as follows:

Morris Prinsky	$ 900.00
Mrs. Paul Kollmar	2,600.00
Mrs. Wm. Reichert	3,560.00

If as stated by the bankrupts in their statement to the County Trust Company of New York, marked Exhibit A, the item of $7,960 did not represent monies owing by the partnership to the bankrupts' wives and to Morris Prinsky, then and in that event those parties were not creditors of the bankrupt partnership and the individual bankrupts should not have filed or caused to be filed or allowed to be filed the said three proofs of debt.

Specification No. 3

(4) The bankrupts, in violation of the National Bankruptcy Act, Sects. 14b(1) and 29b(2) U. S. C. A. Title 11 [fol. 38] Sects. 32b(1) and 52b(2), knowingly and fraudulently made a false oath and account in and in relation to the bankruptcy proceeding herein as follows:

(a) By making a false oath to Schedule A of their schedules in bankruptcy, to the effect that the bankrupt partnership was indebted to Mrs. Paul Kollmar in the sum of $2,600, to Morris Prinsky in the sum of $900 and to Mrs. Wm. Reichert in the sum of $3,560 whereas in truth and in fact the said bankrupt partnership was not indebted to said persons in any amount whatsoever.

(b) On December 11, 1933, the bankrupts testified before Referee Coffin at the first meeting of creditors that the advances made by their wives and by Morris Prinsky were made in cash and that all of the money was drawn by those parties out of savings banks whereas in truth and in fact only a part of the advances was made in cash and only a part of the money came from savings banks. When in-

terrogated by counsel for the Irving Trust Company, the trustee in bankruptcy herein, the bankrupts agreed to return at the adjourned hearing with the savings banks records to substantiate their testimony. They returned at the adjourned hearing but instead of producing the records from the savings banks they changed their testimony and told an entirely different story. They then testified that the cash was not all taken from savings banks but some came from California and some came from a private box of Mrs. Reichert kept at her home.

[fol. 39] Neither the private box nor any records of the California transaction were produced.

(c) On December 11, 1933, the bankrupts testified before Referee Coffin at the first meeting of creditors herein that they had no property, real or personal, separate and apart from the assets in the firm of W. Reichert & Co. whereas in truth and in fact each one of the individual partners had an interest in real property. The bankrupt William Reichert, some years ago, purchased a home at No. 70 Fennimore Road, Mamaroneck, Westchester County, New York. He purchased the property out of monies belonging to the bankrupt partnership. He took title in the name of his wife but he personally went on the bond securing the mortgage on the premises, he personally paid the interest, taxes, water rates and assessments, he personally exercised dominion over the property and he personally, to all intents and purposes, now owns the property. Any contributions by his wife toward the purchase of this property were monies given by the bankrupt to his wife and saved by her. The wife of the bankrupt Reichert had no independent resources. The bankrupt Paul Kollmar, some years ago, purchased a home at No. 41 Bon Air Avenue, New Rochelle, Westchester County, New York. He purchased the property out of monies belonging to the bankrupt partnership. He took title in the name of his wife but he personally went on the bond securing the mortgage on the premises, he personally paid the interest, taxes, water rates and assessments, he personally exercised dominion over the property [fol. 40] and he personally, to all intents and purposes, now owns the property. Any contributions by his wife toward the purchase of this property were monies given by the bankrupt to his wife and saved by her. The wife of the bankrupt Kollmar had no independent resources.

Specification No. 4

(5) The bankrupts, in violation of the National Bankruptcy Act, Sect. 14b(7) U. S. C. A. Title 11, Sect. 32b(7) have failed to explain satisfactorily losses of assets and deficiency of assets to meet their liabilities as follows:

(a) In the said statement to the County Trust Company of New York, marked Exhibit A, the bankrupts stated their total current assets to be $181,685.35

This was as at December 31, 1930. In their statement to the County Trust Company of New York as at December 31, 1931 these assets were put down as ..... $ 96,511.26

In a statement prepared by Henry Brout, certified public accountant employed by the Creditors' Committee in February, 1932, these assets were put down as of February 29, 1932 at ..... $ 47,433.82

In October, 1932, the bankrupts made an assignment for the benefit of their creditors and the assignee reported these assets as follows:

[fol. 41] Nominal Assets—

Merchandise	$ 4,444.00
Accounts Receivable	9,009.77

Actual Assets—

Merchandise	3,225.91
Accounts Receivable	Unknown

And the assignee in accounting to this Court shows that he collected ..... $ 5,936.41
and spent ..... $ 2,124.12

(b) The bankrupts have not satisfactorily explained what has become of their respective homes in Mamaroneck and New Rochelle.

(c) The bankrupts have not satisfactorily explained what has become of the cash and the good receivables which they had between February, 1932 (when they had a meeting of their creditors), and October, 1932 (at which time they made an assignment for the benefit of their creditors). These assets are shown by comparing the report of Henry Brout, certified public accountant, as at February 29, 1932,

and the report of Louis P. Galenson & Company, certified public accountants, as at October 18, 1932.

Dated, December 27, 1933.

Lawyers County Trust Company, by Raymond M. Frost, Vice President.

[fol. 42] EXHIBIT "A" TO SPECIFICATIONS IN OPPOSITION TO PETITION FOR DISCHARGE

Corporation Statement

C R 2-2M-3-31.

To County Trust Company of New York:

Name: W. Reichert & Co.
Address: 15 West 37th Street, New York City.

The undersigned, for the purpose of procuring, establishing, extending, or renewing credit, and/or other accommodations or benefits which may be requested, direct or otherwise, from time to time, from County Trust Company of New York, hereby furnishes the following statement and information, which is represented and warranted as being a true and correct statement of the financial condition of the undersigned, including all liabilities, direct and contingent, on the 31st day of December, 1930, and which you are authorized to consider as continuing as a true and correct statement of the financial condition of the undersigned until another statement in writing shall be substituted for this statement.

The undersigned is engaged in the business of Impts. & Mfrs. of Jewelry at 15 West 37th St., trading under the name of W. Reichert & Co., and keeps regular books of account of said business, including ledger, journal, cash book, check book and ——. (Cross out any of books mentioned not a part of your business records).

In consideration of your granting such credit and any other accommodation or benefit to the undersigned, it is agreed that if at any time the undersigned stops payment or becomes insolvent, or commits an act of bankruptcy, or if at any time a receiver of the property of the undersigned [fol. 43] is appointed, or if any of the representations made herein or below prove to be untrue, or if any of the accounts or assets of the undersigned are transferred or

encumbered, or if execution be issued on any judgment obtained against the undersigned, or if default be made by the undersigned upon any obligations, direct or indirect, to County Trust Company of New York, or in the event of it appearing at any time that any change has occurred in the financial condition of the undersigned, which, in your opinion, you deem materially affects the ability of the undersigned, to pay all claims and demands against the undersigned, or in the event of the dissolution of the undersigned, then all obligations, direct or indirect, held by you shall immediately become due and payable without demand or notice, irrespective of the due dates of such obligations or however arising, and the same may be charged against the balance of any deposit account kept by the undersigned with you, the undersigned hereby agreeing that the said Trust Company shall have a continuing lien against the balance of any said deposit account and/or any other moneys and/or personal property the undersigned may have in said Trust Company.

Assets

Cash on hand	5,635.60
Cash in County Trust Co. of New York	
Cash in other Banks or Trust Companies	
Due from Customers:	
Accts. Receivable (Good—not pledged)	117,389.13
Notes Receivable (Good—cost or market lower)	749.72
Mdse. Finished (Valued how ——)	
" Unfinished (Valued how ——)	57,910.90
" Raw (Valued how ——)	
Listed Bonds and Stocks	
U. S. Government Securities	
Total current assets	$181,685.35
[fol. 44] Due from Officers, Directors, Employees and Stockholders	
Due from Controlled or Allied Concerns:	
For Merchandise Sold	
For Advances made	
Machinery and Equipment	
Furniture and Fixtures	8,955.81

Store Supplies, etc.	
Deferred Charges	
Investments in Affiliations	
Land and Buildings (see other side)	
Good Will	
Patents	
Advances to salesmen on comm. accounts	9,081.78
Other Investments or assets	
Final total	$199,722.94

Liabilities

Notes Payable to County Trust Co. of New York	25,000.00
" " to other Banks or Trust Companies	
" " for Paper Sold	
" " for Merchandise	
" " for Machinery & Equipment	
Accounts Payable for Merchandise	53,724.09
" " for other Purposes	
Trade Acceptances Given	
Due to Officers, Directors, Employees and Stockholders	
Due to Affiliations	
Money Deposited with this Company	
Total current debts	$ 78,724.09
Mortgage Debt:	
Due	
Bonded Debt:	
Due	
Interest Rate	
Lien on What Assets	
Reserve for Depreciation of Plant and Equipment	4,162.05
Other Reserves	
Other Liabilities	
Total Liabilities	$ 82,886.14
Capital Stock, Preferred	
Net Worth	116,836.80

Capital Stock, Common		
Surplus and Undivided Profits		
Final total		$199,722.94

[fol. 45] Profit and Loss Account

Period from 12/31/29 to 12/31/30.

Sales	$390,333.86	
Less Cost of Mdse. and Sales	234,705.21	
Trading Profit		$155,628.65
Other Income		
Total Net Income		$155,628.65
Operat. Exp., Salaries, etc.	$150,752.59	
Officers' Salaries		
Fixed Charges incl. taxes		
Deductions for Bad Accts.		
Deductions for Depreciation of Plant Equipment		
Other Deductions		
Total Deductions		150,752.59
Net profit		$ 4,876.06
Net Worth as of last Statement	$116,779.36	
Adjustments*	4,818.62	
Net Worth as of this Statement		$111,960.54
Net profit (see above)		4,876.06
Total		$116,836.60
Less Dividends Paid		
Surplus as of this Statement		

* If adjustments involve important amounts, please give details below:

12,778.62 Partner's drawings during 1930
7,960.00 Partner's loans deducted

4,818.62 adjustment in capital.

Contingent Liabilities

Were you contingently liable on statement date?	$3,905.04
	Amount
1. For customers' papers discounted?	$3,905.04
2. For Endorsement or Guarantee?	None
3. For unused balances of Letters of Credit?	
4. Under contracts for merchandise purchased for future delivery?	
(How do such contract prices compare with present market?)	
5. By reason of any other claim or demand?	

[fol. 46] Losses by bad debts during previous year, $6776, taken care of by reserves.

Have you at the present time or during the past year pledged any accounts receivable or other assets as collateral for money borrowed or otherwise; if so, state amount and explain fully? No.

Are all accounts and bills receivable for merchandise sales? Yes.

Amount of insurance carried on: 1. Merchandise, $41,000. 2. Machinery and fixtures, ——. 3. Bldg., ——.

Amount of Life Insurance, ——. Beneficiary, ——.

Do you exchange paper or endorse for anybody? ——. Amounts of notes and accounts receivable past due, ——. Is there any suit or litigation pending against you? ——.

Have you an interest in any other firm or corporation? No. State location of such concern and nature and extent of interest in it. ——.

Do you place commercial paper through brokers (name)? No.

Are your books audited by a Certified Public Accountant? Yes. Who? Nathan Lobell & Co., 11 W. 42.

Was this Statement prepared by C. P. A.? Yes.

[fol. 47] Please give full details below of all real estate owned by you, specifying amount of first, second or other mortgages:

Location: ——.
Description of property: ——.
Yearly rents: ——.
Cost: ——.
Present market value: ——.

Mtg's: ——.
Due & rate: ——.
Held by: ——.
Net equity: ——.

Date submitted Feb. 20, 1931.

Have you had any serious losses through bad debts, inventory depreciation or otherwise between date of within inventory and present time? If so, please itemize. No.

(Signed) W. Reichert & Co. Wm. Reichert, Paul Kollmar, per ——.

To County Trust Company of New York:

We submit herewith Bank and Commercial references:

Present Bank Accounts	Address	Line
Manufacturers Trust Co.	5th & 43rd St., N. Y. City	15,000
Times Square Trust Co.	7th Ave. 40th St.	25,000-10,000

Former Bank Accounts	Address	Line
Pacific Bank	28th St.	

[fol. 48]

References	Address	Credit extended
Lassner & Bamberger, Inc.	10 W. 47th	$5,000.00
Frank L. Wilmarth Co.	Providence, R. I.	
Columbia Jewelry Co.	North Cambridge, Mass.	

Requirements

Forster Chain Corp.	Irvington, N. J.
Progressive Ring Co.	Providence, R. I.
Sussfield & Cie	Paris 21 rue del 'Echiquir

Date February 20th, 1931.

(Signed) W. Reichert & Co., Wm. Reichert, Paul Kollmar.

Duly sworn to by Raymond M. Frost. Jurat omitted in printing.

[fol. 49] In United States District Court, Southern District of New York

In the Matter of W. Reichert & Co., Bankrupt.

In Bankruptcy

No. 56603

Minutes of Hearings Before Referee

Before Harold P. Coffin, Esq., Referee in Bankruptcy,
217 Broadway

New York, September 25, 1933,
11:30 o'clock, A. M.

First meeting of creditors proceeded pursuant to notice.

Appearances

Mr. Morris H. Horowitz, Attorney for Petitioning Creditors.

Mr. Saul S. Myers, Attorney for County Trust Co., Creditor, by Mr. Joseph Guerin, of Counsel.

Messrs. Goldman & Frier, Attorneys for Creditors, by Mr. Slater, of Counsel.

Mr. Meyer Marlow, Attorney for Bankrupt, by Mr. Stanley M. Dorman, of Counsel.

[fol. 50] Mr. Paul Kollmar, Bankrupt.

Mr. William Reichert, Bankrupt.

Mr. Robert M. Falkenau, Attorney for Creditor.

Messrs. Frank, Weil & Strouse, Attorneys for Creditors, by Mr. Richard Kulze, of Counsel.

Colloquy

The Referee: Was there a receiver here?

Mr. Slater: No receiver was appointed. There was an assignee under the State Court, Mr. Elmer Levenson, who proceeded to liquidate the assets and sell all the physical assets, and he collected practically all of the accounts receivable. I believe there is a balance in his hands of five or six thousand dollars at this time. The only assets remaining uncollected are some of the accounts receivable.

The Referee: Do the bankrupts appear this morning?

Mr. Marlow: Both of them.

The Referee: Have the bankrupts filed schedules?

Mr. Marlow: No.

The Referee: How soon will the bankrupts file schedules?

Mr. Marlow: I think as soon as we can get the books, as soon as they will be available for us, and also a report of the assignee, and so forth.

The Referee: How long do you desire to have?

Mr. Marlow: About ten days.

The Referee: The bankrupts are directed to file schedules with the clerk of the court on or about October 9th.

[fol. 51] The Referee: Do you understand the direction of the Referee with respect to the filing of schedules?

(Both the bankrupts responded in the affirmative.)

The Referee: Is it necessary to have a trustee in this matter?

Mr. Slater: Yes, of course, I think there will be some dispute. We represent about 19 creditors, with claims amounting to $2,921, and I nominate Louis Horowitz, 15 Maiden Lane.

Mr. Morris H. Horowitz: I represent three creditors, with claims totalling $7,000, and we nominate the Irving Trust Company.

(Colloquy off the record.)

The Referee: I have five claims, five claims filed by creditors who have given me power of attorney.

Mr. Guerin: I represent two claims—two other claims, totalling another $2,000 and I vote for the Irving Trust Company as Trustee.

Mr. Falkenau: I represent the Manufacturers Trust Company with a claim of $4,545.76, but I understand the claim is not filed. We would vote for the Irving Trust Company.

The Referee: Is it an unliquidated claim?

Mr. Falkenau: Yes.

The Referee: It appears that the creditors have failed to elect a trustee, and I appoint the Irving Trust Company trustee and fix the bond in the sum of $100.00.

Paul Kollmar and William Reichert, the bankrupts, were thereupon duly sworn by the Referee.

The Referee: What do you propose to do with this meeting?

[fol. 52] Mr. Guerin: I ask that it be adjourned until after the filing of the schedules.

The Referee: I will adjourn this hearing to October 18, 1933, at 2:30 P. M.

Meeting adjourned to Oct. 18, 1933, at 2:30 P. M.

[Title omitted]

Before Harold P. Coffin, Referee in Bankruptcy,
217 Broadway

New York, N. Y., December 11th, 1933,
2:30 o'clock P. M.

Adjourned first meeting of creditors proceeded pursuant to adjournment.

APPEARANCES

Henry M. Stevenson, Esq., Attorney for Trustee.

Meyer Marlow, Esq., Attorney for the Bankrupt, by George Cohen, Esq., of Counsel.

Saul S. Myers, Esq., Attorney for Petitioning Creditors, by J. K. Guerin, Esq., of Counsel.

[fol. 53] WILLIAM REICHERT, called as a witness, having been first duly sworn by the Referee, testified as follows:

Examination.

By Mr. Stevenson:

Q. When did you and Mr. Kollmar organize your firm of W. Reichert & Company?

A. In 1920.

Q. And have you been in business continuously ever since then, up to the time of your assignment?

A. Yes.

Q. At any time has there been any other member of the firm other than you and Mr. Kollmar?

A. No.

Q. Just you two partners?

A. Yes.

Q. All during that time?
A. Yes.
Q. You never incorporated your business?
A. No.
Q. You acted entirely as partners throughout the firm partnership?
A. Yes.
Q. Were you equally interested in the partnership or not?
A. What is that?
Q. Did you have equal interests in the partnership?
A. Yes.
Q. Contributed the same amount of money?
A. Yes.
Q. And you shared the profits and losses equally?
A. Yes.
Q. You were in the jewelry business, were you not?
A. Yes.
Q. Just give me a general description of your business, or the way you ran it. Did you have a store where you sold your jewelry?
A. We had a wholesale and importing business.
[fol. 54] Q. Entirely a wholesale and importing business?
A. Yes. We would go to Europe and import merchandise, and we would go to Providence, Rhode Island, and buy merchandise there.
Q. And then you would sell it?
A. And then we would sell it to the department stores and other stores, and jewelry stores.
Q. At the time of your assignment—what is the exact date of the assignment, by the way? Have you got that?
A. October 19th, I think.
Q. October 19th, 1932; is that right?
A. Yes.
Q. At the time you made the assignment, where did you have your firm bank accounts?
A. In the County Trust Company and the Manufacturers Trust Company.
Q. And how long a time had you had your accounts in those two banks?
A. I think the Manufacturers, since 1929, and ever since February, 1931, in the County Trust Company.

Q. And back of that you had your accounts elsewhere, did you? Back of 1929?

A. Back of 1929, we had an account in the Times Square Trust Company.

Q. I see by the accountant's report that there were two loans made to your company by Mr. Saul Arons; one was on the 15th of June, 1932, for $600, and one was on the 27th of June, 1932, for $500. Were those cash advances made of those funds?

A. Those were cash advances, yes.

Q. And will your bank account show the deposits of those sums on those dates?

A. Yes.

Q. Did you give Mr. Arons any notes for those advances?

A. Yes, I gave him notes.

Q. Had you had some considerable business transactions with him before the loans were made?

A. For quite some time, yes.

[fol. 55] Q. Had he been a customer?

A. No, he used to collect accounts for us.

Q. And at the same time, you assigned certain accounts to Mr. Arons as collateral security for the loans?

A. Yes.

Q. Have you that document—the written assignment—in your possession, or has it been turned over to the assignee?

A. It has been turned over to the assignee. I have not got that.

Q. From those accounts certain collections have been made?

A. Yes, I think so.

Q. And there are still outstanding some other collections?

A. That you would have to ask Mr. Arons, I think.

Q. You also executed an assignment to your attorney, Mr. Meyer Marlow, in payment of a bill that he had rendered for professional services; is that true?

A. That is correct.

Q. Have you any statement from Mr. Marlow as to what services he rendered?

A. That was also turned over to the assignee. They took it when they took over everything.

Q. It appears that your wife made the following advances to your firm: On July 31, 1930, $560; on September

30, 1930, $1,000; on October 31, 1931, $1,000; and on October 14th, 1931, $1,000; making a total of $3,560, as against which there has been one payment of $60, leaving an apparent balance of some $3,500. Did your wife advance that money by check?

A. That was advanced by cash.

Q. In cash?

A. All paid in. The books will show all that was paid in.

Q. Was it deposited in cash in your bank?

A. It was deposited in the bank on those days.

Q. Can you give any explanation as to why your wife [fol. 56] advanced that money in cash rather than by check?

A. Yes, because I got it from the savings bank.

Q. Didn't she have any checking account?

A. No, she had no checking account.

Q. Can you give me the name or names of the saving banks from which you drew?

A. Bowery Savings Bank.

Q. Were all of the withdrawals made from that bank, the Bowery Savings Bank?

A. Yes.

Q. What is the location of that bank?

A. 42nd Street.

Q. So, the records of that bank, and your wife's account with that bank, will show those withdrawals?

A. Oh, yes.

Q. It appears from the books that you had a salesman by the name of Louis Friml, to whom it appears you made advances on unearned commissions, as I understand it?

A. Yes.

Q. Which amounts to $3,332.98. Can you tell me how long Mr. Friml was with you before you made your assignments?

A. He came—he entered our employ on January 1, 1931.

Q. Just what arrangement did you have with Mr. Friml as to his compensation?

A. He got a weekly drawing account, and a certain amount while he was on the road.

Q. What was the amount of his weekly drawing account?

A. As far as I can remember, I think it was $25, and while he was on the road.

Q. $25 a week?

A. And $75, while he was on the road additional.

Q. Those advances were made to him against whatever commissions he should earn, were they not?

A. Yes.

Q. And did you have any agreement with him as to [fol. 57] whether or not he would refund any unearned advances?

A. He owed us the money, as far as that is concerned. He was supposed to make it in commissions. He received 12½ per cent. commissions on all his sales.

Q. Well, assuming that he did not make as much as whatever you paid him, was he supposed to refund any advances that had been made him on account?

A. There was no agreement about it. There was nothing said that he didn't owe it to us. It was not said that he did not owe it to us any more.

Q. Did you make a settlement with Mr. Friml from time to time on account of his commissions?

A. Did I what?

Q. Did you settle his account? Did you have a settlement with him once in a while?

A. Well, it was simply he got a statement every month.

Q. Every month?

A. Yes.

Q. You would render him a statement once a month?

A. Yes.

Q. Showing the advances that you had made?

A. Yes.

Q. And showing the amounts of commissions that he had earned?

A. That is right.

Q. Have you any record in your office of those statements?

A. It ought to be there.

Q. You will be able to get them, will you not?

A. I have nothing more. I have none of the papers.

Q. They are in the hands of the assignee?

A. He took over the assets. I have nothing.

Q. I see, by examining the accountant's statement, that for the year that ended December 31, 1931, the gross profits on sales was $46,945.83, and the commissions to salesmen was $35,226.47. Is it not a fact that all earned commissions [fol. 58] on the $46,945.83 of sales were fully paid?

A. I don't quite catch that.

(Discussion off the record.)

Q. Did Mr. Friml stay with you until you made your assignment in October, 1932?

A. No, he left in February, 1932.

Q. In February, 1932?

A. Yes.

Q. So, he was with you for a year and two months?

A. For a year and two months, yes.

Q. Are you able to tell me approximately how much time he was on the road, drawing at the rate of $100 a week, as distinguished from being here and drawing at the rate of $25?

A. He was there about 38 weeks; roughly, about 38 weeks.

Q. He was on the road?

A. He was on the road. I would say that he was on the road approximately 38 weeks out of 52, and approximately 14 weeks at home.

Q. Yes; but I am talking about the next year. He was there two months more? About the same ratio?

A. During 1931? During the eight weeks of 1932, he was out practically all the time.

Q. Have you any idea how much Mr. Friml earned in commissions during that period?

A. I would have to look back to see how much he sold. That can be easily checked up.

Q. Now, take Mr. Jack Fried, another salesman to whom you made advances?

A. Yes.

Q. It appears that your advances to Mr. Fried amounted in the aggregate to $4,743.02. How long was Mr. Fried with you?

A. He was with us before, and then we took him back later on in, I think it was, 1929.

[fol. 59] Q. Well, you settled with him. This was for the later period?

A. Yes, for the later period. He had been with us at some earlier period. He had left and then come back. All of the advances were paid him during the period after his return.

Q. About when did he come back?

A. He also gave up—in February, 1932, he gave up our line. He returned to our employ sometime in the summer of—probably, July, 1929.

Q. But he stayed with you up to when?

A. He carried our line until the end of February, 1932.

Q. So that these advances were all made to him during that period; that is, from in or about July, 1929, to the end of February, 1932; is that correct?

A. Yes.

Q. And during that time, what was your arrangement with Mr. Fried?

A. In the beginning, he got 15 per cent. commission, and later on he had 12½ per cent. commission, and we advanced him $125 a week while out on the road, and either $40 or $50 a week while he was home. I am not quite sure. Either $40 or $50.

Q. And did he get similar statements every month?

A. Every month he got a statement.

Q. And therefore, there will be statements during that period of his employ, that will show the advances paid to him on account of commissions that he earned?

A. Yes.

Q. You also appear to have had with you a salesman to whom you made advances, whose name was William Reissman. Tell us what the period of his employment with your firm was.

A. It may be about ten years. William Reissman had been with us some years up to the time of our failure. The period, however, that was covered by a drawing account [fol. 60] arrangement was from probably January 1st, 1928 up to September, 1932. During that time he did not go on the road at all. Reissman only went on the road occasionally. For the most part he was in or around New York City. During that period he had a drawing account at the rate of $40. During the comparatively short period when he was on the road he had a drawing account at the rate of about $65.

Q. What arrangement did you have with a salesman whose name is Joe Stadtman?

A. He covered the New England territory, and covered the greater part of New York.

Q. Was he on the road most of the time?

A. Stadtman was on the road most of the time. I may have been confused in giving some of my answers regard-

ing the compensation of these salesmen. Friml was paid at the rate of $25 a week when he was in New York, and $105 a week when he was on the road. Fried was paid at the rate of $40 a week when he was in New York, and $165 a week when he was on the road. Reissman was paid at the rate of $40 a week when he was in New York City, and $65 a week when he was on the road. Stadtman got $40 a week when he was in New York, and $120 a week when he was on the road. All of these salesmen paid their expenses out of the extra compensation they got when they were on the road, and we did not reimburse them for those expenses. Our monthly statements of account with all of these men will show the amount paid them each week and the amounts of commissions which they earned in each week.

Q. Have you any property of your own as distinguished [fol. 61] from the interest you had in this firm?

A. No, nothing whatsoever.

Q. How much money did you put in the firm when you went into it?

A. 1903, I had about $10,000.

Q. And did you make contributions from time to time, to the business?

A. The business made it. It came out of the business.

Q. Not only that, but isn't it a fact that the business made a very handsome profit for a good many years?

A. It did.

Q. When you went into this business you had other property than $10,000 that you contributed, didn't you?

A. No, nothing else.

Q. Didn't have anything else in the world?

A. No, nothing else.

Q. Everything you had you put in it?

A. Everything I had I put in it.

Q. Have you at any time in your life owned any real estate?

A. No.

Q. When were you married, Mr. Reichert?

A. 1912.

Q. Have you any children?

A. Two boys.

Q. Are they grown up at present?

A. One boy was 21 in September, and the other boy was 16 in June.

Q. Your wife is still living, I take it.

A. Yes.

Q. Where did you live during the period of this partnership? Where were you living when you went into the partnership?

A. I lived first in Brooklyn, and then in Mamaroneck.

Q. Do you now live in Mamaroneck?

A. I live in Mamaroneck now.

Q. And the same apartment or the same house you have had for some time?

A. Yes.

Q. Is it a house or an apartment?

A. A house. Since 1923, I have lived there.

[fol. 62] Q. And have you rented the house or did you buy it?

A. We bought the house.

Q. In 1923?

A. Yes.

Q. Did you pay for it?

A. Mrs. Reichert paid for it.

Q. Did she have means of her own independent of yours?

A. Yes.

Q. From money that you gave her?

A. From money that I gave her, and money that she had of her own.

Q. And she took title to the house at the time you bought it?

A. Yes.

Q. And it has been in her name ever since?

A. Ever since.

Q. Any mortgage on the house?

A. Yes.

Q. When was the mortgage put on it?

A. At the time of the purchase.

Q. Can you tell me what she paid for the house, and how much mortgage it has on it?

A. She paid $22,500, and the mortgage is $8,000.

Q. And it has continued ever since just the same?

A. Yes. The mortgage originally was higher, but we paid some of it off, and the mortgage is $8,000.

Q. The mortgage, when she bought the house was more than that, but it has been reduced from time to time?

A. Yes.

Q. Were you not able to save quite a substantial amount during the more prosperous years of your partnership?

A. I always left the money in the business, outside of what she had—what we drew out. We didn't draw any money out of the business. We left it in the business to make the business grow up.

Q. You and Mr. Kollmar had the same drawing account?

A. Yes.

[fol. 63] Q. How would you draw, by the week or by the month?

A. Well, by the week. Sometimes we did not have enough, but when we could do it, we always did it by the week.

Q. And without exception, yours and Mr. Kollmar's withdrawals were identical?

A. Yes, they were identical.

Q. How much a week would you ordinarily draw out?

A. Sometimes $50, and when times got better, $50 to $100, and when times got very good, $200, and then we would come down again. When we came down again, we took out about $50 or $60.

Q. And you were unable to continue in business, were you, after 1932?

A. Yes.

Q. You made your weekly withdrawals right up to the last, I suppose, in some amount or other?

A. Yes.

Q. What was the lowest figure that you reached at the end?

A. About $60 a week.

Q. And then, at the end you made an assignment?

A. Yes. I want to correct my testimony to the effect that Mr. Kollmar and I started the business by each contributing $10,000.00. I started this business by myself in 1903. Mr. Kollmar came to me as a salesman in 1905. On January 1, 1920, I took Mr. Kollmar in with me as a partner. At the beginning, in 1903, I had about $10,000. That I put into my business. On the 1st of January, 1920, I had substantially more than that in cash in my business—cash and stock in my business. Mr. Kollmar didn't make any contribution of cash to the business at the time I took him in partnership. I wanted him to stay with me, because

I looked upon him as a desirable partner and did not want [fol. 64] him to go out and start any competition. But he did not invest any cash in the business, and never has invested any. From the time he went into the firm with me, he and I shared the profits together. At no time did Mr. Kollmar and I divide lump sums as profits in the business. We drew week by week what we thought the business warranted our withdrawing, and that continued up to the very end.

Paul Kollmar, called as a witness, having been first duly sworn by the Referee, testified as follows:

Examination.

By Mr. Stevenson:

Q. You have listened to all the testimony that Mr. Riechert has given, Mr. Kollmar?

A. Yes.

Q. Is your recollection exactly the same as Mr. Reichert's as to all the matters as to which he has testified?

A. Yes.

Q. So that you know, do you, that his statements are without exception, entirely true, so far as they relate to the business.

A. Yes.

Q. I am excluding the questions about his wife, and so forth?

A. Yes.

Q. It appears that your father-in-law, Mr. Ponsky loaned the firm $3,000 on June 30th, 1930?

A. Yes.

Q. And against that loan payments were made as follows: On December 11th, 1930, $100; on December 19th, 1930, $2,000; and that left a balance of $900?

A. Yes.

[fol. 65] Q. Was that money advanced to the firm in cash or by Mr. Ponsky's check?

A. I think it was in cash.

Q. Have you any explanation to make as to why it was advanced that way, rather than by check?

A. My father-in-law took it out of the savings bank.

Q. What savings bank did he take it out of?

A. Either the Bowery or the Greenwich Street Bank.

Q. What is his full name?

A. Morris Ponsky.

Q. Is he still alive?

A. He is.

Q. And there is still unpaid, is there, a balance of $900, to Mr. Ponsky?

A. Yes.

Q. It also appears that Mrs. Kollmar advanced the firm $3,000, and I do not find in the accountant's report a statement of the date when that advance was made. Can you supply the date? Tell me about when it was, so that we can check it up later on?

A. (No answer.)

Q. If you are not able to state, you can find it by an examination of your records or ledgers, can't you?

A. Yes.

Q. Do you know whether it was paid by check or by cash?

A. I think it was paid by cash.

Q. Did your wife also have a savings bank account?

A. Yes.

Q. And was this withdrawn from her savings bank account?

A. Yes.

Q. And what was the name of the savings bank account?

A. Bowery Savings Bank.

Q. The same as the bank where Mrs. Reichert had her bank account?

A. Yes.

Q. So, your wife's bank account will show the withdrawal of that money?

A. Yes.

Q. And that was deposited—that and your father-in-[fol. 66] law's loan likewise were deposited in your firm bank account, were they not?

A. Yes.

Q. So that all those transactions will show by their bank accounts and their savings bank accounts?

A. Yes.

Q. Mr. Kollmar, did you put the same amount of money into this firm that your partner, Mr. Reichert, put in?

A. No.

Q. Mr. Kollmar, when you first went in with Mr. Reichert as a salesman, in 1905, how old a man were you?

A. I was twenty years old.

Q. So that now you are a man of 48?

A. About 50.

Q. I don't care how old you are, I just want to get a kind of a picture of this.

A. Yes.

Q. You are several years younger than Mr. Reichert?

A. Yes.

Q. Had you any property of your own when you went in with Mr. Reichert?

A. No, sir.

Q. When were you married, Mr. Kollmar?

A. I was married in 1921.

Q. And where did you live at that time or after you were married?

A. New York City.

Q. Have you lived here ever since?

A. No, I lived once in New Rochelle.

Q. You are living in New Rochelle now?

A. No, I am living in the city again.

Q. Have you ever owned any real estate?

A. I have not.

Q. Have you at this time any property of any kind?

A. No property, no.

(Adjourned to December 14th, 1933, at 2:30 P. M.)

[fol. 67] [Title omitted]

Before Harold P. Coffin, Esq., Referee in Bankruptcy, 217 Broadway

New York, December 14, 1933,
2.30 o'clock P. M.

Adjourned first meeting of creditors.
Proceeded pursuant to adjournment.

APPEARANCES

Mr. Henry M. Stevenson, Attorney for Trustee.
Mr. Meyer Marlow, Attorney for Bankrupt.

Mr. Saul S. Myers, Attorney for Petitioning Creditors, by Mr. Joseph K. Guerin, of Counsel.

WILLIAM REICHERT, recalled.

By Mr. Stevenson:

Q. Now, as I understand it, Mr. Reichert, your wife made three loans, or, rather, made four loans, one on July 31, [fol. 68] 31, 1930, for $560.00, one on September 30th for $1,000, one on October 31, 1930, for $1,000, and the last one on October 14, 1931, for $1,000, or a total of $3,560; and the only payment that has ever been made on these loans is one payment made on June 16th for $60.00?

A. Yes.

Q. It is also a fact, as I understand it, that Mrs. Kollmar made a loan of $3,000, the date of which I don't find which loan must have been made prior to either one of those two payments, one payment made on January 14, 1931, for $300.00 and another payment on January 24, 1931, for $100.00?

A. (No answer.)

Q. Was the $3,000 loan before that date would you say?

A. (No answer.)

Q. Did your wife put in $3,000 about the same date?

A. (No answer.)

Mr. Stevens: I will put it this way.

Q. It appears from the paper before me that Mrs. Kollmar made a loan of $3,000; the date when the loan was made is not stated in this paper but it appears that there were two payments made against this loan, one on January 14, 1931, for $300.00 and one on the 24th of January, 1931, for $100.00; are you certain that the $3,000 loan had been made before either one of those payments had been made?

A. Yes.

Q. So, that left a balance after the payments had been made of $2600?

A. Yes.

Q. And no part of that has ever been paid?

A. No.

Q. Mr. Ponsky, the father-in-law of Mr. Kollmar, also made a loan on the 30th of June, 1930, for $3,000?

A. Yes.

[fol. 69] Q. As against which two payments were made, one on the 11th of December, 1932, for $100.00, and one on the 19th of December, 1932, for $2,000?

A. Yes.

Q. Making a total of $2100 and leaving a balance after those payments had been made of $900.00?

A. Yes.

Q. And no payment has ever been made on account of that?

A. No.

(Colloquy off the record.)

Mr. Stevenson: The examination of the witness was interrupted at the request of the attorney for the bankrupt, in order that Mr. Kollmar might make a statement in the nature of a correction of the testimony given by him at the last hearing. Do you wish to make a correction, Mr. Kollmar?

Mr. Kollmar: Yes.

Mr. Stevenson: You may state the correction you wish to make.

Mr. Kollmar: I am not quite sure whether the complete amount was drawn out of the savings bank.

Mr. Stevenson: What complete amount?

Mr. Kollmar: Of the loan.

Mr. Stevenson: From your wife?

Mr. Kollmar: Was payment out of the savings bank. I think she received a check from California around that time, which she might have used in part.

Mr. Stevenson: The savings bank records would disclose that?

Mr. Kollmar: Yes.

[fol. 70] Mr. Stevenson: Mr. Reichert also stated that he desired to make a correction in the testimony which he had given at the last hearing. What is the correction you wish to make, Mr. Reichert?

Mr. Reichert: I believe I said that the whole amount was taken out.

Mr. Stevenson: What whole amount?

Mr. Reichert: $3,560.

Mr. Stevenson: By whom?

Mr. Reichert: By Mrs. Reichert, was taken out of the savings bank, but I now find that part of it was taken out

from her private account, which she had at home, and the other from the savings bank.

Q. Mr. Reichert, do you remember your company getting a loan from the County Trust Company of $10,000 on the 20th of February, 1931?

A. Yes.

Q. And at that time you and Mr. Kollmar signed a statement stating the condition of your partnership, its assets and liabilities, for the purpose of procuring the loan, didn't you?

A. Yes.

Q. Is this the document that I now show you—is this document I now show you the paper that you signed on that occasion?

A. Yes.

Q. And after this document had been signed by you and Mr. Kollmar, the loan of $10,000 was made by the County Trust Company?

A. Yes.

Q. At that time there was an indebtedness, wasn't there, on the part of your firm to your wife, Mr. Kollmar's wife, and Mr. Kollmar's father-in-law, which aggregated $6,060?

A. Yes.

[fol. 71] Q. Is that so?

A. Yes.

Q. Where in this statement is there any statement regarding that indebtedness, aggregating $6,060?

A. That is not in here, that was capital at that time.

Q. I don't understand.

A. We intended to repay that during the year, that $6,000. We figured it as capital.

Q. I know, but you appreciate, don't you, that when people lend money they are going to be influenced by the amount of money that the persons they are lending it to owe others?

A. Yes.

Q. And don't you realize that the amount of money that you and your partner owed members of your family respectively, which were debts of the company, were liabilities that might have influenced the County Trust Company in determining whether they would lend that $10,000 or not?

A. Our accountant stated it was perfectly all right, he said, "If you consider that as a personal loan," we could figure that as part of our capital.

Q. If you figured it as part of your capital, then it could not have been a loan by members of your families. There must have been some arrangement with them whereby it was to be treated as capital of the company and not to be a loan, isn't that so?

A. We were supposed to repay that during the year.

Q. You don't answer the question. If that money was to be repaid as a loan, why doesn't it appear in here as a liability of your company?

A. Because we considered it as capital.

Q. Was it capital, not what you considered it, what was it?

A. In here it was capital.

[fol. 72] Q. When did it cease to become capital and become an indebtedness that was to be repaid?

A. At the end of that year.

Q. Who decided it?

A. We decide- it.

Q. Didn't you discuss it with the people that loaned the money?

A. No.

Q. You and your partner simply changed your minds about it and decided it was to be money owed to members of your families and would have to be repaid, is that so?

A. It seems that way.

Q. Will you tell me what you mean by this item, which I find on this sheet; you have here in the statement $12,778.60, partners drawing during 1930, and you have this item $7,960, partners' loan deducted, and subtracting one from the other, you have an item of $4,881.62, adjustment in capital, what do you mean by that?

A. This must be the loans—personal loans we mentioned before.

Q. The $7,960?

A. Yes.

(Colloquy off the record.)

Mr. Stevenson: Now I will discontinue with Mr. Reichert's examination.

PAUL KOLLMAR, recalled.

By Mr. Stevenson:

Q. You have heard the testimony that Mr. Reichert has just given?

A. Yes.

[fol. 73] Q. Regarding the $10,000 loan from the County Trust Company and regarding the statement that you both signed?

A. Yes.

Q. I show you the statement and I ask you if you recognize your signature here as well?

A. Yes.

Q. Have you any explanation to make regarding the loans by members of your family and also Mr. Reichert's family, contained in here, other than the explanation made by Mr. Reichert?

A. None at all.

Q. Have you any different explanation to make than Mr. Reichert made as to the item of $7,960, and setting that up as partners' loan deducted?

A. No.

Q. What is the answer?

A. No.

Mr. Stevenson: I want to have this sheet marked for identification.

(Paper marked Trustee's Exhibit No. 1 for Identification, Dec. 14, 1933.)

Mr. Stevenson: I am going to request Mr. Guerin to furnish a copy of the sheet.

Mr. Guerin: I will.

Q. Your house that you own in New Rochelle, or, rather, the house your wife had, when was that sold?

A. It was not sold.

Q. It was not sold?

A. No.

Q. You are not living in it now?

A. No.

Q. Is it rented?
A. Yes.
Q. How long has it been rented?
A. Since the first of October.
Q. Since the first of October?
A. Yes.
Q. How much a month is paid for the rental?
A. $135.00 a month rent. The first month there were some payments for fixing up the place.
[fol. 74] Q. It is rented at the rate of $135.00 a month?
A. Yes.
Q. Who is the rent paid to?
A. To Mrs. Kollmar.

Hearing adjourned at instance of attorney for the Trustee to December 21, 1933, at 2:30 P. M.

[Title omitted]

Before Harold P. Coffin, Esq., Referee in Bankruptcy, 217 Broadway

New York, December 21, 1933,
2:30 o'clock, P. M.

Adjourned first meeting of creditors proceeded pursuant to adjournment.

APPEARANCES

Mr. Henry M. Stevenson, Attorney for Trustee.
Mr. Saul S. Myers, Attorney for Petitioning Creditors, by Mr. Joseph K. Guerin, of counsel.
[fol. 75] Mr. Meyer Marlow, Attorney for Bankrupt, by Mr. Cohen, of Counsel.
Mr. William Reichert, Bankrupt.
Mr. Paul Kollmar, Bankrupt.

COLLOQUY

Mr. Stevenson: I have been informed since the last hearing by counsel for the bankrupt that they desire to make a statement in the nature of corrections; that is, corrections

as to the testimony which they have before given, and I now invite them to make whatever statement they wish to make in that connection.

Mr. Reichert: I wish to make the following statement for the purpose of clar-fying and amending the testimony given at the last hearing, in reference to certain loans made by relatives of myself.

In 1930, Mrs. Reichert lent me certain moneys which I, in turn, gave to the business immediately. This loan was made to me and not to the partnership but I presume that since the money was immediately put into the business, the bookkeeper, without having asked me as to the method of entry of these loans, made up certain loan accounts showing these loans to have been made to the partnership itself.

When the financial statement of December, 1930, was made up, Mr. Kollmar, and myself told the accountant, upon his inquiry, that such loans as were from relatives, were not actual loans payable of the partnership, but were loans to the partners who in turn had given them to the partner-[fol. 76] ship as additional contributions to capital. The accountant did not list these loans from relatives, therefore, as partnership liabilities upon the balance sheet, but showed these loans in the adjustment of capital as a deduction from partners' drawings during 1930 in the sum of $12,778.62. The "partners' drawings" then represents the $6,000. annual drawings for each partner plus some traveling expenses, this item being a decrease in capital. The $7,960., partners' loans deducted item, represents the additional contributions to capital, made by both Mr. Kollmar and myself, by means of these loans from relatives.

At the time the schedules were made up, we did not know that there was any distinction made between partnership and individual creditors and, therefore, did not explain to our attorney that these loans from relations were individual debts and not partnership debts. We have been informed by our attorney of this error and will amend the schedules accordingly.

Mr. Stevenson: Do you, Mr. Kollmar, want to make a statement?

Mr. Kollmar: I wish to make a similar statement in reference to loans made by Mrs. Reichert, Mrs. Kollmar and Mr. Ponsky.

Mr. Cohen: I wish to submit withdrawals of claims of Mrs. Reichert and Mrs. Kollmar, which claims were filed as against the partnership estate. Mrs. Reichert and Mrs. Kollmar submit these claims merely against the individual bankrupts and not as against the partnership.

Mr. Ponsky, the father-in-law of Mr. Kollmar, who is a claimant in the sum of $900.00 against the partnership estate, will file a similar consent of withdrawal as soon [fol. 77] as he is able to do so. His inability to comply at this time is caused by serious illness.

Mr. Stevenson: I don't see the necessity at present for any further examination of the bankrupts. I will close the examination with the understanding that the bankrupts will appear for further examination.

Do you wish to ask any questions, Mr. Guerin?

Mr. Guerin: Yes.

WILLIAM REICHERT, recalled.

By Mr. Guerin:

Q. With reference to the statement that you just read into the record, Mr. Reichert, when this adjustment was made in your capital account, was it actually made on your books?

A. No, in the books it was not made because the bookkeeper did not understand the nature of the loans.

Q. What do you mean by that?

A. He did not understand that it was partners' loans. On the books it was merely entered for the record, but the bookkeeper by mistake entered it as loans, but it was loans to us only and not to the partnership.

Q. You were to look for us where this money came from?

A. Yes.

Q. Referring to Trustee's Exhibit No. 1, the financial statement submitted to the County Trust Company of Feb- [fol. 78] ruary 20, 1931, as of the 31st day of December, 1930, you were asked the question in that statement, "Was this statement prepared by a certified public accountant?" and you answered "Yes".

A. Yes.

Q. When you referred a few minutes ago to the bookkeeper did you mean the bookkeeper was a certified public accountant?

A. No, we had a certified accountant.

Q. Who was the certified accountant?

A. Mr. Lobell.

Q. And is he the man that made the entries on this statement?

A. He prepared the statement for us.

Q. Is he the man that also made the entries in the books?

A. No, he did not make the entries in the books, we had another bookkeeper.

Q. Your books were checked by Mr. Lobell?

A. Yes.

Q. And did Mr. Lobell at any time point out to you that in the statement he prepared for you he made this capital adjustment on these loans from your relatives whereas your books showed they were partnership debts to relatives?

A. I don't recall whether he actually went into every single item in the books.

(Colloquy off the record.)

(Question repeated by the stenographer.)

The Witness: He may have pointed out to the bookkeeper that adjustment should be made.

Q. Did he point it out to you?

A. He told us at that time I think, but he may have forgotten to mention it.

Q. What did he tell you?

[fol. 79] A. He said that these are partnership loans—that these are partners' loans and not partnership loans.

Q. How often did he check your books?

A. He did not check them very much in 1931. He did not go into detail in the books at all during that year.

Q. Did he ever check them after December 31, 1930?

A. He may have, I cannot recollect any more.

Q. What is your best recollection of the last time he went over your books?

A. It is so long ago I cannot tell you when he looked through the books again.

Q. Have you no recollection at all?

A. He may have come up and looked through the books—

Q. I am trying to get your recollection, not what he may have.

A. I cannot say anything definitely.

Q. You have no recollection at all as to the last time he checked your books?

A. No, I have not.

Q. After he told that to you do you remember whether or not you told your accountant or your bookkeeper?

A. I may have told the bookkeeper, it is possible.

Q. What is your recollection, did you or did you not?

A. I may have told the bookkeeper, but the bookkeeper may have left it out not thinking it was very important.

Q. I want to get away from the words "may have," I want your best recollection as to whether you did?

A. I think I did tell the bookkeeper, but I don't know whether she did not forget it. I think I told her to do it.

Q. It is your best recollection that you did?

A. That is my best recollection.

[fol. 80] Q. Do you remember giving any other financial statement after this one?

A. I think we gave one in 1931—the end of 1931.

Q. Do you know what that statement showed as to these particular items?

A. I don't know exactly, have you got it there?

Mr. Guerin: I offer this paper in evidence.

(Paper received in evidence and marked Petitioning Creditors' Exhibit No. 1, Dec. 21, 1933.)

Q. Will you look at that and see what that statement shows as to this particular item of loans of partners' relatives?

A. This is an error and should have been left out, it is an absolute mistake, it should have been left out. It is a mistake.

Q. You signed that statement?

A. We made a mistake in putting this liability in.

Q. I show you a letter of February 10, 1932, from William Reichert & Company to the County Trust Company of New York, and I ask you whether that is your signature on that letter?

A. Yes.

Q. And, having looked at that letter, will you state about when the financial statement as of December 31, 1931, was signed by you?

A. I don't know more than when it was signed.

Q. Looking at the letter, when would you say you signed it?

A. Maybe at the same time and maybe afterward and maybe before, that I cannot tell you.

Q. That letter encloses this statement to the County Trust Company?

A. Yes.

[fol. 81] Q. You recall that?

A. Possibly, I don't recollect it.

Q. Having read the letter, does the letter refresh your recollection that the statement went with that letter?

A. Well, of course, as it says here, it must have been sent at the same time.

Q. Having your recollection refreshed to that extent, when approximately would you say that the financial statement was signed by you?

A. It must have been signed at the same time as the letter was written.

Q. That is, on or around February, 1932, is that right?

A. Yes.

Q. How do you explain that the statement as of December 31, 1932, contains the entry of loans payable (partners' relatives), $7,960, if a year before that your certified public accountant had called to your attention that they were not loans to the partnership but individual loans?

A. There was no doubt a mistake on the part of the bookkeeper and it was overlooked to be corrected.

Q. But you signed the statement?

A. I signed the statement, yes.

Q. And did you check these items before you signed?

A. We looked through the thing, but that amount was on the books as a matter of record.

Q. I just want to get from you now your explanation of how you signed this statement one year after Mr. Lobell had called to your attention that this item was really a capital adjustment item and was not an indebtedness from the partnership to the partners' relatives?

A. It would have been better for us if the item would have been left out, it would have been.

[fol. 82] Q. You don't answer the question, I want to know how you explain that you permitted it to stay in?

A. We evidently did not grasp and we were not experienced enough to understand the difference between loans to us and loans to the partnership, and that is the only explanation I can make. There was nothing wrong intentionally.

Q. Was the original adjustment shown on the statement of February 10, 1931, as of December 31, 1930, made at the suggestion of the County Trust Company?

A. No, oh, no, they never said anything to us.

Q. Did the County Trust Company ever tell you that before they would make the loan to you on February 20, 1931, that your books would have to be adjusted so that there was no indebtedness from the partnership to the partners' relatives?

A. There was never anything mentioned on the part of the County Trust Company or anybody from the County Trust Company that referred to any part of the statement, neither this part or any other part.

Q. Did Mr. Lobell tell you at that time that the statement that you were giving the County Trust Company should show that the money received from partners' relatives should be put into the capital account and not carried on the loan account?

A. I don't recollect. I think we thought perhaps we could wipe out these loans through our drawings in the course of the year.

Q. Was it you that suggested it to Mr. Lobell?

A. No, I did not suggest anything.

Q. I want to get now where did the suggestion come from as to the manner that this item should take—at least, the form that this item should take on the financial state-

[fol. 83] ment submitted to the County Trust Company?

A. (No answer.)

Mr. Guerin: Do you understand the question?

(Question repeated by the stenographer.)

The Witness: I don't remember.

Q. Was it your suggestion?

A. Suggestion of what?

Q. That this item of $7,960 should appear as capital adjustment and not as a loan due to relatives of the partners?

A. I cannot remember any more who made the suggestion.

Q. Have you no recollection at all?

A. I have no recollection whatsoever.

Q. Do you remember whether or not it was your suggestion?

A. If I have no recollection, I cannot say either way. I don't remember it.

Q. Did you suggest it?

A. I say, I don't remember it.

Q. Do you remember whether or not Mr. Kollmar suggested it?

A. I don't remember, that is three years ago.

Q. Do you remember whether or not Mr. Lobell suggested it?

A. We may have all talked it over or nobody may have talked it over, I don't remember it.

Q. Do you remember whether or not the representative of the County Trust Company——

A. The County Trust Company never said anything regarding our statement. It never made any remarks about our statement.

Q. For how long a period of time has Mr. Lobell been your accountant?

A. Oh, for six or seven years, maybe longer.

[fol. 84] Q. This money, as I understand it, that you borrowed from your wife, Mr. Kollmar's wife and his father-in-law, was received at various times during the year 1930, is that right?

A. I suppose so.

Q. As each item came in how did you put that on your books?

A. We gave it to the bookkeeper and it was deposited in the bank.

Q. Did your books show that they were borrowed moneys?

A. She put it down as Mrs. Reichert, so much.

Q. Then, came a day when you called in your certified public accountant, isn't that so?

A. Yes.

Q. Do you remember what he advised you as to these items when he first saw them on your books?

A. He said, "Those are loans made to you, aren't they?", and I said, "Yes".

Q. Does that refresh your recollection in any way as to the source of the suggestion that these items were to be put in your books as adjustment in capital?

A. No, it does not.

Q. Doe that refresh your recollection in any way as to the preparation of the financial statement submitted to the County Trust Company?

A. No.

Q. Trustee's Exhibit No. 1 as of December 14, 1931?

A. It does not, in any way.

Q. All of the other items on this statement, were they checked by you before you signed that statement?

A. They were made up by the bookkeeper. I did not go into each and every item.

Q. Was this statement made up by the bookkeeper or was it made up by Mr. Lobell?

A. It was made up by the bookkeeper and Mr. Lobell went over the figures I suppose.

Q. Before you signed it did you go over the figures?

A. I looked at the statement.

[fol. 85] Q. Did you go over the figures?

A. I did not go over the figures.

Q. Do you know whether or not the figures on here are right or wrong?

A. I will have to take the bookkeeper's word for it. I did not check the books, I did not keep the books.

Q. Whose word did you take, the bookkeeper's word or Mr. Lobell's word?

A. Both, I had other things to do, and I could not keep the books.

Q. On the 31st of December, 1930, this statement shows that you had accounts receivable good and not pledged of $117,389.13, is that correct?

A. If it is there it is correct, I suppose.

Q. If it is here, do you also say that the accounts receivable in that sum were all good?

A. That is a hard thing to say, how can I tell you now whether they were all good.

Q. What is your best recollection as to whether they were all good or not?

A. I suppose they were good at that time.

Q. Do you know whether any part of those accounts receivable were in the hands of collection agencies?

A. That is too far—I would have to go over the books to give you an answer to that.

Q. The statement also shows that you had merchandise on hand, cost or market, $57,910.90.

A. Yes.

Q. Is it your recollection that on the 31st day of December, 1930, you did have merchandise of that value on hand?

A. I should think so, otherwise it would not be on the statement.

Q. Do you recall when you first called a meeting of creditors and stated to your creditors that you were unable to continue in business?

A. Yes.

Q. When was that?

A. The beginning of March, 1932.

[fol. 86] Q. On February 10th you sent this statement as of December 31, 1931, to the County Trust Company, and the letter enclosing the statement reads: "As per your request we are attaching financial statement per December 31, 1931, also profit and loss statement for last year prepared by our accountant, Mr. N. Lobell, C. P. A." Does that refresh your recollection as to the last time Mr. Lobell was on your books for you?

A. Probably at the time we sent that letter.

Q. Does it also refresh your recollection that this statement, Petitioning Creditors' Exhibit No. 1 as of this date, was prepared by Mr. Lobell?

A. Yes, it was prepared by him.

Q. Does it also refresh your recollection and does it also indicate that Mr. Lobell O. K.'d this statement, Petitioning Creditors' Exhibit No. 1 as of this date, with the item of loans payable, (partners' relatives) $7,960?

A. I don't know whether he saw the statement after that, I don't know that.

Q. Did Mr. Lobell prepare it?

A. I think he did.

Q. That is, your testimony is that that is a mistake on his part also, that that particular item is included in the statement?

A. He may have overlooked it.

Q. What is your recollection, if you have any?

A. I have no recollection.

PAUL KOLMAR, recalled.

By Mr. Guerin:

Q. Do you agree with all these answers given by Mr. Reichert?

A. I had so little to do with the books that I have to agree with Mr. Reichert's answers. I cannot say anything else.

[fol. 87] Q. Have you any independent recollection?

A. No.

Q. As to how these items were shown on your books?

A. No.

Q. Have you any independent explanation to make as to how in the statement of December 31, 1930, these items appear as adjustment in capital, and in the statement of December 31, 1931, they are shown as loans of partners' relatives?

A. No, I have no explanation.

Q. Is it also your recollection that those statements, that is, Trustee's Exhibit No. 1 of December 14th, and Petitioning Creditors' Exhibit No. 1 of today, were prepared by Mr. Lobell?

A. (No answer.)

Mr. Guerin: I offer this letter in evidence, being letter of February 10th.

(Paper received in evidence and marked Petitioning Creditors' Exhibit No. 2, Dec. 21, 1933.)

(Question repeated by the stenographer.)

The Witness: I think they were.

Q. Do you remember who suggested that the item on the statement submitted to the County Trust Company of February 10, 1931, as of December 31, 1930, should show this particular item as adjustment in capital?

A. I don't remember.

Q. Do you remember whether the suggestion was made by anybody representing the County Trust Company?

A. Not to my knowledge.

Q. Would you say it was not?

A. I never heard anything mentioned.

Q. Do you remember whether or not Mr. Lobell suggested it?

A. I don't remember.
Q. Did you suggest it?
A. I don't remember, I don't think I did.

Hearing closed.

[fol. 88] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

Upon the affidavit of George Cohen, duly sworn to this 29th day of December, 1933, and upon the application for discharge of William Reichert and Paul Kollmar, individually and as co-partners, trading under the name of W. Reichert & Co., dated October 21st, 1933, and filed in the office of the Clerk of this Court on the 24th day of October, 1933, and upon all the papers and proceedings heretofore had herein, let Charles Weiser, the Clerk of the United States District Court for the Southern District of New York, the Lawyers' County Trust Company, the objecting creditor, Saul S. Myers, its attorney, their representatives, servants, employees and any and all other persons acting for and in their behalf, show cause before me, or one of the Judges of this Court, at a Stated Term of this Court, to be held for the hearing on motions in bankruptcy, at the Courthouse in the Old Post Office Building, in the Borough of Manhattan, City of New York, on the 3rd day of January, 1934, at 10:30 o'clock in the morning, or as soon thereafter [fol. 89] as counsel can be heard why an order should not be entered by this Court, directing that the specifications of the objecting creditor herein should not be vacated and stricken from the records and declared null and void, and why the Clerk should not make and enter an order discharging the above named bankrupts from all debts provable against their estates under the Acts of Congress relating to bankruptcy, except such debts as are excepted by law from such discharge and, in the meantime, pending the final determination of the motion brought on by this order to show cause, and until the service of a copy of an order with notice of entry thereon, setting forth the final determination of the said motion, it is

Ordered that Charles Weiser, Clerk of the United States District Court for the Southern District of New York,

Lawyers' County Trust Company, Saul S. Myers, its attorney, their representatives, servants, employees, and any and all other persons acting for or in their behalf, be and the same hereby are enjoined and restrained from doing any or all acts concerning the proceedings in opposition to the discharge of the bankrupts above mentioned and that all proceedings referred by this Court to Harold P. Coffin, Referee in Bankruptcy, in connection with the discharge of the bankrupts herein, be and the same hereby are enjoined and restrained.

Service of a copy of this order and of the papers above recited, upon which this order is granted, on Charles Weiser, Clerk of the United States District Court for the Southern District of New York, or upon any of his deputy clerks or assistants, and upon Saul S. Myers, attorney for [fol. 90] Lawyers' County Trust Company, on or before twelve o'clock noon of January 2nd, 1934, shall be deemed good and sufficient service.

Dated, New York, December 29th, 1933.

Henry W. Goddard, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE COHEN

STATE OF NEW YORK,
City of New York,
County of New York, ss:

GEORGE COHEN, being duly sworn, deposes and says:

That he is an attorney associated with Meyer Marlow, the attorney for the bankrupts herein.

That heretofore and on the 21st day of October, 1933, the bankrupts herein applied to this Court for their discharge from all provable debts.

[fol. 91] That thereafter the motion for discharge came on before a Justice of this Court sitting at a Stated Term for Bankruptcy and was adjourned to the 27th day of December, 1933. Your deponent appeared upon that day on behalf of the bankrupts.

Mr. Guerin, an associate of Saul S. Myers, appeared and filed with the Court his notice of appearance for the Lawyers' County Trust Company, a creditor objecting to the discharge of the bankrupts.

That at that time, Mr. Guerin requested the Court to grant him leave to file the specifications required by General Order 32 by four o'clock of that day. Over the objection of your deponent, such leave was granted.

Thereafter, on the afternoon of December 28th, 1933, your deponent visited the offices of the Clerk of the District Court, intending to inspect such specifications as were to have been filed on the afternoon of the preceding day.

That upon inspection of the Docket, Volume 120, your deponent discovered an entry which read substantially as follows: "Specifications to be filed by twelve o'clock noon, December 28th, 1933." The next entry read: "Specifications filed." The above entry was of December 28th, 1933.

Your deponent thereupon requested the Clerk to show him the specifications that had been filed and, upon examining them, found the following notation on the cover thereof: "Specifications to be filed December 28th, 1933, by twelve noon."

I stated to Mr. Rogers, the deputy clerk who had given me the papers, that upon the preceding day, Judge Goddard, the Judge presiding over the Bankruptcy Part, had [fol. 92] granted the office of Saul S. Myers leave to file specifications by four o'clock of that same day, December 27th, 1933. He thereupon explained to me that such extension had been granted by Judge Goddard upon the application of Howard Myers, a partner in the firm of Saul S. Myers on the morning of December 28th, 1933.

General Order 32 of the Supreme Court of the United States reads as follows: "A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall at the same time file a specification in writing of the grounds of his opposition."

Under this section, the granting of an extension beyond the date of the hearing on the discharge is unauthorized and the Court had no jurisdiction or power to grant such an extension. The fact is that the specifications so unlawfully filed are null, void and of no effect.

The Supreme Court, in promulgating this new General Order, in the month of April, 1933, removed from the dominion of the District Court any right to exercise its discretion as to the filing of specifications.

In view of the foregoing, it is submitted that there are in fact no valid specifications on file against the application for discharge and therefore an order should be entered granting the discharge of the bankrupts herein and directing the Clerk of the Court to file such discharge.

The reason that this motion is sought to be brought on by an Order to Show Cause and not by a Notice of Motion is so that a stay of the proceedings upon the specifications [fol. 93] might be obtained and so that a determination of this motion may be had before a hearing upon the specifications.

That no previous application has been made for the relief herein sought.

George Cohen.

Sworn to before me this 29th day of December, 1933. Julia Jaffe, Notary Public, Bronx County, Bronx Co., Clks. No. —, Reg. No. 2J185, N. Y. Co., Clks. No. 130, Reg. No. 5J35, Kings Co., Clks. No. 2A, Reg. No. 5039, Commission expires March 30, 1935.

In United States District Court

[Title omitted]

Affidavit of Saul S. Myers

United States of America,
Southern District of New York, ss:

Saul S. Myers, being duly sworn, deposes and says:

[fol. 94] 1. I am the attorney for the Lawyers County Trust Company, the objecting creditor herein, with a claim of $1,917.62.

2. On the return day of the application for a discharge herein Judge Goddard directed that the specifications be filed before 4 P. M. It was not physically possible to finish the specifications and have them verified within that time

and therefore at about 2 P. M. application was made to Judge Goddard, in open court, for further time so that the specifications could be typewritten and verified. The time was thereupon extended to 12 o'clock noon of the following day.

3. It was pointed out to Judge Goddard and is here reiterated that:

(a) We had a similar matter on before Judge Goddard on the same day, to wit the matter of Ruth Bernstein, Bankrupt, which came before the Court from Referee Stephenson. Both the Bernstein matter and this matter required very careful attention and Judge Goddard made the same disposition about the time of the filing of the specifications in both matters.

(b) The most important part of the material for the specifications in this matter only came to light on December 21, 1933, at the first meeting of creditors. The information was elicited by counsel for the Irving Trust Company. There had been no examination of the bankrupts prior to December 11, 1933. Very little was accomplished on December 11, 1933, because the bankrupts did not have in court the books and records which counsel for the Irving Trust Company regarded as essential. These books and records, among others, were the bank books and records of their wives.

[fol. 95] (c) Orie R. Kelly, President of the Lawyers County Trust Company, had just left the hospital where he had undergone a very serious operation, and it was necessary to secure his instructions before these specifications could be filed.

4. I have had charge of this matter on behalf of the Lawyers County Trust Company and from the papers which I have examined and the investigations which I have made I am of the opinion that the specifications are sound and can be proven and that this is a situation where the bankrupts not only secured a large loan from the objecting creditor by reason of a false financial statement but the individual bankrupts committed perjury in respect of that financial statement upon their examination before the referee in bankruptcy.

5. I beg to refer, upon this motion, to the following papers:

(a) The adjudication in bankruptcy and all of the papers upon which it was founded including the motions in respect of the same;

(b) All of the testimony taken before the referee; and

(c) The specifications filed in opposition to the bankrupts' application for a discharge, and the exhibits.

Saul S. Myers.

Sworn to before me this 5th day of January, 1934.
Frank J. Carey, Notary Public, Queens County,
Certificate filed in New York County.

[fol. 96] In United States District Court, Southern District of New York

In Bankruptcy, No. 56,603

In the Matter of William Reichert and Paul Kollmar, Individually and as Co-partners Trading under the Name of W. Reichert & Co., Bankrupts

Saul S. Myers and Joseph K. Guerin, for Petitioning Creditor.

Meyer Marlow (Stanley M. Dorman, of Counsel), for Bankrupts.

Opinion, Patterson, D. J.

Patterson, D. J.:

The bankrupts applied for discharge. On December 27, 1933, the day when the creditors were required to show cause to the contrary, the attorney for an objecting creditor filed a notice of appearance in opposition. Instead of filing specifications on that day, he procured an ex parte order permitting him to file specifications the next day. The specifications were accordingly filed the next day. The bankrupts now bring a motion to have the specifications disregarded and an order of discharge entered.

The practice as to opposing a bankrupt's application for discharge is governed by General Order 32 of the Supreme [fol. 97] Court. That order formerly provided that an objecting creditor should enter his appearance on the return day of the application and should file a specification of his grounds "within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge". The order was amended on April 17, 1933, so as to require that the specification as well as the notice of appearance be filed on the return day. The provision relative to acceleration or extension of the time for filing specifications was omitted. The order now reads:

"A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall at the same time file a specification in writing of the grounds of his opposition".

The contrast between the old and the new rule is significant. It seems manifest that the judge no longer has power to extend the time for interposing specifications beyond the time fixed in the rule. The dropping of the clause that allowed elasticity must be deemed to have been deliberate and intended to work a change in the practice. This is the view of the amended rule that has been taken by Judge Hincks in the District of Connecticut and by the late Judge Lowell in the District of Massachusetts. In re Hodges, 4 Fed. Supp. 804; In re Corcoran, 4 Fed. Supp. 988. It may be that bankrupts not entitled by substantive law to win a discharge will get one because of the speed in procedure required of creditors under the new rule. That [fol. 98] is a matter that the district court cannot take into account.

The court had no power to extend the time for filing specifications beyond the return day of the application. The specifications were filed too late and must be disregarded. The motion will accordingly be granted and an order of discharge entered.

Robert P. Patterson, U. S. D. J.

January 9, 1934.

IN UNITED STATES DISTRICT COURT

Present Hon. Robert P. Patterson, District Judge

In the Matter of WILLIAM REICHERT and PAUL KOLLMAR, Individually and as Co-partners Trading under the Name of W. Reichert & Co., Bankrupts

ORDER FOR DISCHARGE—January 10, 1934

A motion having been made herein by William Reichert and Paul Kollmar, the above mentioned bankrupts, for an [fol. 99] order vacating the specifications heretofore filed by Lawyers County Trust Company, the objecting creditors herein, and directing the Clerk of the Court to enter the discharge of the bankrupts, and the said motion having duly come on to be heard before me on the 3rd day of January, 1934,

Now, upon reading the order to show cause dated December 29th, 1933, the affidavit of George Cohen duly sworn to the 29th day of December, 1933, in support of said motion, and the affidavit of Saul S. Myers duly sworn to the 5th day of January, 1934, in opposition thereto, and after hearing Stanley M. Dorman, of counsel for Meyer Marlow, Esq., attorney for the bankrupts herein, in support of said motion, and Joseph K. Guerin, of counsel for Saul S. Myers, Esq., attorney for the objecting creditor herein, and after reading and filing all the papers and proceedings heretofore had herein, and due deliberation having been had, now, upon reading and filing the opinion of the Court, it is, on motion of Meyer Marlow, Esq., attorney for the bankrupts,

Ordered that the said motion be and the same hereby is granted, and it is further

Ordered that the specifications heretofore filed by Lawyers County Trust Company in the above proceedings, be and the same hereby are vacated, disregarded, and a nullity, and it is further

Ordered that Charles Weiser, the Clerk of the United States District Court for the Southern District of New [fol. 100] York, be and he hereby is directed to enter forthwith the discharge of William Reichert and Paul Kollmar, individually and as co-partners trading under the name of W. Reichert & Co.

Robert P. Patterson, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

The petitioner herein, Lawyers County Trust Company, conceiving itself aggrieved by the order and judgment entered herein on January 10, 1934, granting a discharge to William Reichert and Paul Kollmar, individually and as co-partners trading under the name of W. Reichert & Co., and to the firm of W. Reichert & Co., and vacating the specifications filed herein by the Lawyers County Trust Company on December 28, 1933, hereby appeals therefrom [fol. 101] to the United States Circuit Court of Appeals for the Second Circuit, and prays that its appeal be allowed, and that a citation may be issued to the said William Reichert and Paul Kollmar and to the firm of W. Reichert & Co., commanding them and each of them to appear before the United States Circuit Court of Appeals for the Second Circuit, to do and to receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and opinion in the matter of their said petition for a discharge, in the said proceeding, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Second Circuit, and that the said order and judgment of the District Court of the United States for the Southern District of New York may be reversed, and such order made as to the said United States Circuit Court of Appeals for the Second Circuit may seem meet and just.

Dated, January 17, 1934.

Lawyers County Trust Company, by John J. Spillane, Assistant Secretary, Petitioner.

Duly sworn to by John J. Spillane. Jurat omitted in printing.

[fol. 102] IN UNITED STATES DISTRICT COURT

ALLOWANCE OF APPEAL

Appeal allowed January 17, 1934.

William Bondy, U. S. D. J.

[fol. 103] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes Lawyers County Trust Company which files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the order and judgment, made by this Honorable Court on January 10, 1934, granting to the above named bankrupts a discharge and vacating the specifications filed herein by the Lawyers County Trust Company on December 28, 1933:

1. The Court erred in dismissing the specifications herein and granting to the bankrupts and to each of them a discharge of their debts.

2. The Court erred in ignoring the one-day extension of time granted by Judge Goddard for the filing of specifications.

3. The Court erred in holding that under General Order 32 of the Supreme Court of the United States, as amended on April 17, 1933, the District Court no longer has power to extend the time for interposing specifications beyond the time fixed in the rule, to wit, the return of the order to [fol. 104] show cause why the bankrupts should not receive a discharge.

Dated, January 17, 1934.

Lawyers County Trust Company, by John J. Spillane, Assistant Secretary, Appellant.

Saul S. Myers, Attorney for Appellant, 60 Wall Street, New York City.

Duly sworn to by John J. Spillane. Jurat omitted in printing.

[fol. 105] Citation, in usual form, omitted in printing.

[fol. 106] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, February —, 1934.

Saul S. Myers, Attorney for Appellant. Meyer Marlow, Attorney for Appellees.

[fol. 107] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 108] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

No. 396

Argued April 30, 1934. Decided Aug. 17, 1934

In the Matter of WILLIAM REICHERT and PAUL KOLLMAR, Individually and as Copartners Trading under the Name of W. Reichert & Co., Bankrupts,

LAWYERS COUNTY TRUST COMPANY, Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Appeal from an order of the District Court for the Southern District of New York striking out specifications of objection to the granting of a discharge in bankruptcy because not filed on the day when the creditors were required to show cause and from the granting of the discharge. Dismissed in part and affirmed in part.

Howard Myers, of New York City (Saul S. Myers and Joseph K. Guerin, both of New York City, of counsel), for appellant.

Meyer Marlow, of New York City (Stanley M. Dorman and George Robert Cohen, both of New York City, on the brief), for appellees.

CHASE, Circuit Judge:

In this action in bankruptcy an order had been made requiring creditors to show cause on a day certain why a discharge should not be granted. On that day attorneys for a creditor, representing that but recently facts had been discovered on which it was desired to base objections to a discharge, and that as the grounds of opposition were charges so serious that authorization for filing specifications containing them should first be given by the president of the objecting creditor who had been confined in a hospital and had had no opportunity to consider the matter, obtained

leave from the judge to file such specifications on the following day, and did then file them. Upon motion the specifications so filed were later stricken out, and the judge who took this action at the same time and in the same order directed the clerk "to enter forthwith the discharge" of the bankrupts. From this order the objecting creditor took an appeal without first obtaining leave.

It is claimed that there should be a dismissal of the appeal on the ground that the order was not appealable as of right. So far as that part of the order which struck out the specifications is concerned, leave to appeal was necessary as is shown by United Wall Paper Factories v. Hodges (C. C. A.) 70 F. (2d) 243. But here, as in the case just mentioned, the part of the order granting the discharge was appealable without leave, and, as the order to strike was an essential step in granting the discharge, it may be considered on the assignments of error. It is said that the only order so appealable is the formal entry made by the clerk which alone is final. Of course the order must be final, but the finality that is required is the action which disposes of the matter by way of judicial determination. France & Canada S. S. Co. v. French Republic (C. C. A.) 285 F. 290; Sullivan v. Associated Billposters and Distributors (C. C. A.) 6 F. (2d) 1000, 42 A. L. R. 503. Nothing remained to be done at the time this appeal was taken other than for the clerk to comply with the order of the judge. That was a [fol. 109] purely ministerial act which followed as a matter of course. The order was final when the appeal was taken. Compare Gas & Electric Securities Co. v. Manhattan & Queens Traction Corp. (C. C. A.) 266 F. 625.

We have held that without good cause shown a District Judge has no power, after General Order 32 was amended and the amendment became effective on April 24, 1933 (11 U. S. C. A. § 53), to extend the time for filing specifications of objection beyond the day when creditors are required to show cause. Now we have what appears to have been good and sufficient cause for granting an extension of one day for the filing of such specifications, and the question of power to grant any extension is squarely presented.

Before General Order 32 was amended in April, 1933, it read:

"A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition,

shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge."

The amendment altered it to read:

"A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall at the same time file a specification in writing of the grounds of his opposition."

The change was, of course, deliberate and appears to us to be highly significant. Before, the judge had the express power to shorten or enlarge the time for filing specifications of objection, but by the amendment, all such power was withdrawn. Indeed, the sole purpose of the amendment, aside from including an extension proposal within its coverage, seems to have been to do away with this express power and more strictly limit the opportunity to create delays in administration even at the expense of some flexibility. Unless this is so, the amendment merely made the day when creditors are required to show cause the rule day for filing specifications of objections instead of the ten-day period immediately following, and left the actual time after the return day still wholly in the sound discretion of the judge. This view of the amendment requires a reading in by construction of all of the final clause of the order which was omitted by the amendment except the words "shortened or," and we can reach no other conclusion than that, if it had been the purpose to leave such power in the judge, the language by which it had before been expressly conferred would not have been omitted.

So we think the filing of specifications of objection on the day when creditors are required to show cause is an absolute condition upon their right to oppose a discharge unless the judge may enlarge the time under the power conferred by General Order 37 (11 U. S. C. A. § 53). Under that "* * * the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading. * * *" That the specifications of objections

must be considered a part of the pleadings is evident. Yet we do not think such specifications can properly be classed with pleadings generally and the time for filing varied in the discretion of the judge because for many years they have for this purpose been especially dealt with in General Order 32 and still are. That order has the force of a specific statute relating to its subject-matter, Wilkinson v. Walker (D. C.) 292 F. 395, and must, under familiar rules of construction, take precedence over general legislation which might otherwise control. The change was merely one of procedure and not of any substantive provisions of the law and so clearly within the power of the Supreme Court. Cases construing the order before amendment are not now helpful, since the very purpose of the amendment was to work a change in the procedure upheld in those decisions.

Order affirmed.

[fol. 110] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 24th day of August, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of WILLIAM REICHERT and PAUL KOLLMAR, etc., Bankrupts,

LAWYERS COUNTY TRUST COMPANY, Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 111] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re William Reichert, etc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 24, 1934. William Parkin, Clerk.

[fol. 112] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 111, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of William Reichert and Paul Kollmar, etc., Bankrupts; Lawyers County Trust Company, Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 15th day of October, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 113] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 292.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,124. U. S. Circuit Court of Appeals, Second Circuit. Term No. 496. Lawyers County Trust Company, Petitioner, vs. William Reichert and Paul Kollmar, individually and as co-partners trading under the name of W. Reichert & Co. Petition for a writ of certiorari and exhibit thereto. Filed October 26, 1934. File No. 496, O. T., 1934.

(5698-C)

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"Donovan" Report on Administration of Bankrupt Estates (House Committee Print, 71st Congress, 3rd Session) 6, 7
Remington on Bankruptcy, 4th Ed. Vol. 7, Sec. 3201, p. 427 (1934) 7

Supreme Court of the United States,

OCTOBER TERM, 1934.

No. .

LAWYERS COUNTY TRUST COMPANY,

Petitioner,

v.

WILLIAM REICHERT and PAUL KOLLMAR, individually and as co-partners trading under the name of W. REICHERT & Co., Bankrupts.

MAY IT PLEASE THE COURT:

The petition of the Lawyers County Trust Company respectfully shows to this Honorable Court:

Question Presented.

April 17, 1933, this Court amended General Order XXXII in Bankruptcy (288 U. S. 619, 632). The scope of the amendment is shown by the following text of the order, in which the language deleted by the 1933 amendment appears in brackets, and the language added appears in italics:

"XXXII

"Opposition to Discharge or Composition *or Extension.*

"A creditor opposing [the] *an* application [of a bankrupt] for [his] discharge, or for the confirma-

> tion of a composition *or extension proposal,* shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall *at the same time* file a specification in writing of the grounds of his opposition [within ten days thereafter, unless the time shall be enlarged by special order of the judge]."

The sole question in this case is whether this amendment puts it altogether beyond the power of the Bankruptcy Court to grant an extension of time within which a creditor opposing discharge may file his written specifications of the grounds of his opposition, where such creditor duly appears on the return day, objects to the discharge, and shows good cause for such an extension.

Summary and Short Statement of the Matter Involved.

In this bankruptcy proceeding an order had been duly entered requiring creditors to show cause on a day certain why a discharge should not be granted to the present respondents. On that day this petitioner duly appeared by counsel, as a creditor objecting to the discharge. On such appearance, counsel for petitioner represented to the court that the grounds of opposition had but recently come to light; that the charges against bankrupts were so serious that authorization for filing written specifications should first be given by the President of petitioner, who had just left the hospital where he had undergone a serious operation (R. 94-95). On this statement, the court granted an extension of time until noon the next day for the filing of the specifications. They were duly filed within such extended period (R. 91), and contained grave charges of wilful fraud and violations of the bankruptcy act by respondents, both prior to and in the bankruptcy proceedings (R. 28-40).

Thereafter, on motion of bankrupts, the court disregarded the specifications on the sole ground that they were filed beyond the time provided by amended General Order

XXXII, the court taking the view that that amendment must have been intended to put it beyond the power of the bankruptcy court to grant any extension of time whatever for the filing of the written specifications. The District Court's opinion (R. 97-98) admits that "It may be that bankrupts not entitled by substantive law to win a discharge will get one because of the speed in procedure required of creditors under the new rule. That is a matter that the district court cannot take into account."

The Circuit Court of Appeals affirmed. It agreed that "we have what appears to have been good and sufficient cause for granting an extension of one day for the filing of such specifications and the question of power to grant any extension is squarely presented" (R.). The decision is based solely and squarely upon the view that, by deleting from General Order XXXII the provision "unless the time shall be enlarged by special order of the judge", and by inserting the requirement that the specifications shall be filed on the return day, this Court must necessarily have intended to put it beyond the power of the bankruptcy court to grant any extension whatever.

Reasons Relied on for the Allowance of the Writ.

(1) *The decision of the Circuit Court of Appeals, Second Circuit, in this case is in direct conflict with a decision of the Circuit Court of Appeals, Seventh Circuit, on the same matter, and is inconsistent with a decision of the District Court of the United States for the Southern District of California, which the Circuit Court of Appeals, Ninth Circuit, and this Court, successively refused to review.*

The decision in the instant case is in direct conflict with the decision in *In re Lerner*, 70 F. (2) 938 (C. C. A. 7, May 8, 1934). In that case creditors appeared on the return

day, made formal, oral objection to discharge, and requested and received a ten day extension of time within which to file their written specifications of objection. To the subsequent contention of the bankrupt that amended General Order XXXII denied to the court all power to grant an extension of time for the filing of specifications, the Circuit Court of Appeals answered that it could not believe that the amendment was intended to take away from the bankruptcy courts, which are courts of equity, all power to allow extensions of time or to permit amendment of pleadings, on good cause shown; that objections and specifications are pleadings, and the latter are "merely elaborations" of the former; that, as pleadings, they are subject to the usual rule as to the discretion of the trial judge as to extensions and amendments; that the purpose of the amendment of General Order XXXII could be accomplished by requiring statement of objection on the return day, but without taking from the court the power to allow an extension for the filing of the written specifications. "We cannot believe" said the Circuit Court of Appeals "that the order was intended to take away from the District Court all discretion in matters that are primarily those of pleading."

In *McIntosh* v. *Seymour*, certiorari denied June 4, 1934 (292 U. S. 652), the District Court allowed a trustee, who had not even appeared on the return day, to file specifications in opposition to discharge seventeen days after the return day had passed; and, for good cause shown, it overruled a motion by the bankrupt, based on amended General Order XXXII, to dismiss them. The Circuit Court of Appeals for the Ninth Circuit, exercising its discretion under section 24(b) of the Bankruptcy Act, refused to allow an appeal from the order overruling the motion. This Court denied the bankrupt's petition for writ of certiorari. An inspection of the petition for writ of certiorari and of the supporting and opposing briefs in that case discloses that the basis of the petition was the contention that under amended General Order XXXII the District Court

was powerless to consider the specifications presented out of time; while the respondent asserted that the amended order did not withdraw from the bankruptcy court its inherent and statutory powers to grant extensions or to relieve defaults.[1]

(2) *The misconstruction of amended General Order XXXII by the Circuit Court of Appeals arises from its failure to consider public documents which afford a reason for the amendment and indicate that its purpose was other than that attributed to it below.*

Both the District Court and the Circuit Court of Appeals in this case felt compelled to reach their conclusions by the mere fact that the amendment strikes out the clause giving the judge express power to shorten or enlarge the time for the filing of specifications. They conclude that the dropping of the clause was deliberate, and was intended to accomplish speed at the expense of flexibility (R., 97,). In so concluding the courts below have overlooked the fact that the amendment also changes the *normal time* when specifications are to be filed. We believe that this is highly significant, and that the real purpose of the amendment was to delete the provision giving the creditor ten days after appearance in which, *as of right,* to file specifications.

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[1] No. 998, October Term, 1933. The petition claimed conflict with *In re Corcoran,* 4 Fed. Supp. 988 (DCUS Mass.) and *In re Hodges,* 4 Fed. Supp. 804 (DCUS Conn.), affirmed, *sub nom. United Wall Paper Factories* v. *Hodges,* 70 F. (2) 243 (CCA 2, April 2, 1934). There was, however, no conflict of Circuit Court of Appeals decisions at that time. The Circuit Court of Appeals in the *Hodges* cases had ruled no more than that, after the amendment of General Order XXXII, the District Court had no power to releive a default in filing specifications *without good cause shown.* Judge Learned Hand in that case reserved the question whether "there may be excuses for failing to comply". The Circuit Court of Appeals for the Second Circuit, sitting without him in this case, has now decided that there are none. The denial of certiorari by this Court in the *McIntosh* case may well have been in the view that a ruling that there was good ground for excusing the default in that case (a point pressed by the respondent there) did not conflict with the ruling of the Circuit Court of Appeals in the Second Circuit in the *Hodges* case. It is possible, of course, that this Court doubted its jurisdiction to issue a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit in the *McIntosh* case, since the decision of that court in that case had been merely a discretionary refusal to allow an appeal. *Cf. Ferguson* v. *District of Columbia,* 270 U. S. 633, 634.

The omission of an express grant of power to the judge to enlarge that time is explainable upon the ground that it was thought to be unnecessary.

Support for this view of the amendment is not lacking. In framing the 1933 amendments and additions to the General Orders in Bankruptcy, this Court undoubtedly had before it, inter alia, the Attorney General's Report on Bankruptcy Law and Practice (Senate Document No. 65, 72d Congress, 1st session) and the "Donovan" Report on the Administration of Bankrupt Estates (House Committee Print, 71st Congress, 3d session). Both of these reports show that, under General Order XXXII as it stood before the amendment, unscrupulous creditors were using the 10 day period, given them *as of right* within which to file specifications in opposition to discharge, in order to force bankrupts to "buy off" the opposition to discharge.[2] It is this evil which we believe this Court set out to correct in amending General Order XXXII. We do not believe that the Court intended to restrict the power of the District Courts, *on good cause shown*, to grant enlargements or to relieve defaults. The provision for enlargement was

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[2] The Donovan report, commenting upon General Order XXXII as it then stood, states: "An unscrupulous creditor who desires to get something more than the others may be tempted to file a notice of appearance (a simple 4-line document) at the time of the hearing on confirmation, knowing that this will hold up the entire proceeding for at least another 10 days even if he does not follow up the notice of appearance with detailed specifications of objection. During this 10-day period he may hope to get paid off by the bankrupt. If the bankrupt refuses or is unable to strike a bargain, the creditor may then file his specifications of objection, so that the bankrupt will face another three weeks' delay, during the process of which he may be finally induced to come to terms" (p. 116).

The Attorney General's report states: "The clerks of 72 district courts reported to us that, out of the 49,928 cases closed by them in the fiscal year 1930, 27,426 applications for discharge had been disposed of. In only 1,042 of these cases individual creditors at the time of the hearing before the judge on the bankrupt's application filed notices of appearance stating that they intended to oppose the discharge. Under General Order XXXII, these creditors were then required to file specifications in writing within 10 days, setting forth the grounds of this opposition, upon the filing of which the issues would be tried. But in 330 of these 1,042 cases the creditors did not follow up their notices of appearance by filing written specifications. Why? Presumably, because the creditors were either bought off by the bankrupt as already described, or became indifferent, or were unwilling to incur further expense . . ."

omitted because unnecessary. This view has been advanced by a standard text.[8]

To read the amended order as the courts below in this case have done is to fail to take into consideration a purpose which we regard as plain in the light of the evil pointed out in the Donovan Report and the Attorney General's Report. The language of the Order, as amended, does not require the conclusion that anything more was intended than to take away the *absolute right* of a creditor to a 10-day delay between objection and filing of specifications. The evil feared will not be fostered by reading the amended rule as permitting the judge, on good cause shown, to grant an extension. Here the Circuit Court of Appeals admits that there appears to be good and sufficient cause shown. The extension was for but a day. There is not a line in the record to indicate—and every circumstance repels—the inference that harm or evil could occur through the extension.

(3) *The decision below fails to take into consideration the provisions of other General Orders and of the Bankruptcy Act itself.*

We submit that the courts below erred in failing to read amended General Order XXXII in the light of the following:

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[8] Remington on Bankruptcy, 4th Ed. Vol. 7, sec. 3201, p. 427 (1934): "Although the express permission of former General Order 32 that the time for filing specifications in opposition to the discharge might be shortened or enlarged by special order of the judge was eliminated when the Supreme Court amended the General Order in 1933, yet it cannot rightly be inferred from such change that the general power of courts to grant extension of time in remedial matters is in this particular abrogated; indeed, the retention of the requirement that appearance in opposition must be entered in writing on the return day, while, at the same time, it is prescribed that specifications in writing are to be filed also on the return day, would carry the necessary implication that, on occasion, an extension of time to file the specifications might be granted; otherwise there would not be the double requirement of the entry of appearance on the return day and of the filing of the specifications on the same day, since the specifications themselves would constitute the most positive form of entry of appearance in opposition. *Perhaps the expressing of the power to grant such extension was eliminated precisely because unnecessary.*"

Sec. 14(b), Bankruptcy Act: "the judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard; and investigate the merits of the application and discharge the applicant, unless he has" committed stated offenses.

Bankruptcy Act, sec. 2(15) gives the bankruptcy courts power to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act".

Bankruptcy Act, sec. 2: "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

General Order XXXVII: "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order *in any case,* vary the time allowed for return of process, for appearance and pleading . . ."

(4) *The decision below is a narrow construction of the General Order, not warranted by its terms or history.*

Prior to the 1933 amendment, it was uniformly held that the bankruptcy court had the power to grant extensions of time to file specifications.

In re Brecher, 4 F. (2) 1001 (C. C. A. 2nd, 1925);
Rerat v. *Fisk Tire, Inc.,* 28 F. (2) 607 (C. C. A. 5th, 1928);
Schlesinger v. *Phillips,* 36 F. (2) 191 (C. C. A. 5th, 1929);
In re Stiebel & Sons, 40 F. (2) 637 (C. C. A. 6th, 1930);

In re Levin, 176 Fed. 177 (C. C. A. 1st, 1910);
In re Nathanson, 152 Fed. 585 (D. C. S. D. N. Y., 1907);
In re Morgan, 101 Fed. 982 (D. C. W. D. Ark., 1900).

The language of General Order XXXII, as now amended, does not expressly deprive the bankruptcy court of such power. The decisions below are based solely upon the omission of the granting clause. We submit that the power to grant extensions of time to file pleadings, or to amend them, is inherent in any court, except where statutes forbid. The reason for the change in 1933 in this general order which is advanced herein, supra, we believe to be sound. We further believe that had this Court intended to prevent extensions, even on good cause shown, it would have said so expressly. We cannot believe that this Court intended by the amendment to set "springes" for court or counsel (cf. *Davis* v. *Wechsler,* 263 U. S. 22, 24); or that a Court which has so recently taken a liberal and enlightened attitude with respect to the right of litigants to amendment of pleadings generally (*United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 68; *United States* v. *Factors & Finance Co.,* 288 U. S. 89, 93), and which has, in another field, decried the framing of inflexible "standards of behavior that amount to rule of law" (*Pokora* v. *Wabash Ry. Co.,* 292 U. S. 98, 105), could have intended so to amend this General Order as to defeat the power to grant a clearly reasonable extension on the facts of this case, and so, possibly, to defeat the ends of justice.

(5) *We desire to preserve, although we think it will not be necessary, the contention which we raised below that if the General Order in question be construed as the court below has construed it then it is in contravention of the Bankruptcy Act and beyond the power of this Court.*

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of

this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket:

In the Matter
of
William Reichert and Paul Kollmar, individually and as co-partners trading under the name of W. Reichert & Co.,
Bankrupts,
Lawyers County Trust Company,
Appellant.

and that the decree of the said United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

Lawyers County Trust Company,
Petitioner,

By Howard Myers,
Joseph K. Guerin,
Saul S. Myers,
Counsel for Petitioner.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 496

LAWYERS COUNTY TRUST COMPANY, *Petitioner,*

against

WILLIAM REICHERT AND PAUL KOLLMAR, INDIVIDUALLY AND AS CO-PARTNERS TRADING UNDER THE NAME OF W. REICHERT & CO., BANKRUPTS.

SUPPLEMENTAL BRIEF FOR PETITIONER AND MOTION TO ADVANCE.

The question presented in this petition for a writ of certiorari is whether this Court by the amendment of April 17, 1933, to General Order No. XXXII in Bankruptcy intended to put it altogether beyond the power of the Bankruptcy Court to grant an extension of time within which a creditor opposing discharge may file his written specifications of the grounds of his opposition, where such creditor duly appears on the return day, objects to the discharge and shows good cause for such an extension. The District Court and the Circuit Court of Appeals for the Second Circuit held that such was the effect of the amendment to this General Order. In our petition for a writ of certiorari we point out that the decision of the Circuit Court of Appeals

for the Second Circuit in this case is in direct conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *In re Lerner,* 70 F. (2d) 938, wherein the Circuit Court of Appeals for the Seventh Circuit held that the amendment did not rob the court of the power to grant an extension upon good cause shown. This Court, on October 8 last, granted a writ of certiorari in the *Lerner* case (No. 292, present term, *Lerner* v. *First Wisconsin National Bank et al.*), and it is assumed that the writ will be granted in this case also in view of the direct conflict. We believe that there are special reasons, as follows, why this Court should grant the writ in this case and not merely hold the petition pending the disposition of the *Lerner* case:

(1) While the opinion of the Circuit Court of Appeals in the *Lerner* case proceeds upon the ground that the amendment to General Order No. XXXII was not intended to take away from the Bankruptcy Court the power to permit amendments of pleadings or extensions of time, it also proceeds upon the alternative ground of estoppel—for that Court in its opinion points out that the petitioner in that case had acquiesced in the request for an extension and would not be heard later to challenge the order of extension. There are no findings in our case that the respondents acquiesced in the extension. Thus, there may be a material distinction between the cases notwithstanding that the two Circuit Courts of Appeals are in direct conflict as to the construction of the amended General Order.

(2) We present in Point (2) of our petition for a writ of certiorari (pp. 5-7) an argument in support of our view of the meaning of the General Order which has not been presented in any of the briefs filed in No. 292 and has not been considered by any of the several courts which have had occasion to consider the question of the construction

of the amended General Order. In the cases in which the point has arisen, both in the opinion of the courts and in the briefs of counsel, argument has revolved around the power of bankruptcy courts, as courts of equity, to relieve defaults or to grant extensions or to permit amendments of pleadings, but, so far as we are aware, our argument based upon the reason for the change which this Court made in the General Order as shown by public documents relating to the evil to be cured, has not heretofore been advanced, and we believe that we should have opportunity to present this argument to the Court more fully.

(3) We are also advised that counsel for the respondents in the *Lerner* case No. 292 are not as yet certain whether they will present an oral argument. We believe that both sides of this question should be presented to the Court and therefore submit that we should be permitted to participate in the oral argument.

Accordingly, we respectfully move that the Court grant the writ of certiorari in this case and assign it for argument at an early date, with the *Lerner* case, No. 292.

Respectfully submitted,

HOWARD MYERS,
JOSEPH K. GUERIN,
SAUL S. MYERS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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LAWYERS COUNTY TRUST COMPANY,
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v.

WILLIAM REICHERT AND PAUL KOLLMAR, INDIVIDUALLY AND AS CO-PARTNERS TRADING UNDER THE NAME OF W. REICHERT & CO., Bankrupts.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

HOWARD MYERS,
JOSEPH K. GUERIN,
SAUL S. MYERS,
Counsel for Petitioner.

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II. That purpose was fully accomplished by changing the normal time for the filing of specifications. The omission of express grant of power to allow extensions was not essential to its accomplishment, and it cannot properly be inferred therefrom that this Court intended to abrogate a power in the Bankruptcy Court theretofore well settled both under the General Order and upon general principles	10
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SUPREME COURT OF THE UNITED STATES

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against

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Opinions of the Courts Below.

No opinion was rendered in the District Court by Judge Goddard in granting the one-day extension of time to file specifications (R. 63). The opinion of Judge Patterson in the District Court, granting the motion to strike the specifications and granting an order of discharge, is not reported but appears in the record at pp. 66-67.

The opinion of the Circuit Court of Appeals affirming the order of Judge Patterson is reported in 73 F. (2d) 56, and appears in the record at pp. 73-76.

Jurisdiction.

The date of the order to be reviewed is August 24, 1934 (R. 76). The petition for writ of certiorari was filed and the case docketed in this Court on October 26, 1934. Writ of certiorari was granted on December 3, 1934.

The specific claims advanced and rulings made in the lower courts, which are relied upon as the basis for review by this Court, are briefly set out in the Statement of the Case, *post,* and, in the interest of brevity, they are not repeated here.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938, 28 USC 347a), and is believed to be clear.

Moore v. *Bay,* 284 U. S. 4;
Cooper v. *Dasher,* 290 U. S. 106.

Question Presented.

April 17, 1933, this Court amended General Order XXXII in Bankruptcy (289 U. S. 619, 632). The scope of the amendment is shown by the following text of the order, in which the language deleted by the 1933 amendment appears in brackets, and the language added appears in italics:

"XXXII

"Opposition to Discharge or Composition *or Extension.*

"A creditor opposing [the] *an* application [of a bankrupt] for [his] discharge, or for the confirmation of a composition *or extension proposal,* shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall *at the same time* file a specification in writing of the grounds of his opposition [within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge]."

The sole question in this case is whether this amendment puts it altogether beyond the power of the Bankruptcy Court to grant an extension of time within which a creditor opposing discharge may file his written specifications of

the grounds of his opposition, where such creditor duly appears on the return day and enters his appearance, objects to the discharge, and shows good cause for such an extension. The decisions of the lower Federal courts are not in agreement upon this question,[1] which is now presented to this Court for the first time.

Statement of the Case.

In this bankruptcy proceeding an order had been duly entered requiring creditors to show cause on a day certain why a discharge should not be granted to the present respondents. On that day this petitioner duly appeared by counsel, as a creditor objecting to the discharge, and filed a written Notice of Appearance in Opposition. Thereafter, on the same day, while the court was still in session, counsel for petitioner represented to the court that the grounds of opposition had but recently come to light; that the charges against the bankrupts were so serious that authorization for executing and filing written specifications should first be given by the president of petitioner, who had just left the hospital where he had undergone a serious operation (R. 65). On this statement, the court

[1] In *In re Corcoran*, 4 Fed. Supp. 988 (D. C. U. S., Mass.), it was held that the amended General Order took from the court all power to allow extension of time, and in *In re Hodges*, 4 Fed. Supp. 804 (D. C. U. S., Conn.), it was held that the order put it beyond the power of the court to allow the filing of the specifications after the return day. The latter decision was affirmed by the Circuit Court of Appeals for the Second Circuit (*sub nom. United Wall Paper Factories* v. *Hodges*, 70 F. (2d) 243, L. Hand, J.) upon the ground that good cause for the default had not been shown in that case—assuming *arguendo* that the amended General Order did not take from the court the power to excuse default on good cause shown. In the instant *Reichert* case both the District Court (Judge Patterson) and the Circuit Court of Appeals for the Second Circuit (Chase, J.), held that the amendment took away all power to allow extensions. But in *Matter of Palestine* (No. 58229, unreported), Judge Knox sustained the extension, stating "* * * it is difficult for me to believe that a failure to file specifications of objections to a bankrupt's discharge will, in all circumstances, bar the subsequent filing of such specifications." In *In re Lerner*, 70 F. (2d) 988 (co-pending with the instant case on writ of certiorari, No. 292), the Circuit Court of Appeals for the Seventh Circuit held that the right of the court to extend the time was not affected by the amendment.

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granted an extension of time until noon the next day for the filing of the specifications. They were duly filed within such extended period (R. 63), and contained grave charges of wilful fraud and violations of the bankruptcy act by respondents, both prior to and in the bankruptcy proceedings (R. 14-24). When these specifications were filed the Bankruptcy Court was still in session and holding the job Bankruptcy Term.

Thereafter, on motion of the bankrupts, the court disregarded the specifications, on the sole ground that they were filed beyond the time provided by amended General Order XXXII, the court taking the view that that amendment must have been intended to put it beyond the power of the bankruptcy court to grant any extension of time whatever for the filing of the written specifications. The District Court's opinion (R. 66-67) admits that "**It may be that bankrupts not entitled by substantive law to win a discharge will get one because of the speed in procedure required of creditors under the new rule. That is a matter that the district court cannot take into account.**"

The Circuit Court of Appeals affirmed. It agreed that "we have what appears to have been good and sufficient cause for granting an extension of one day for the filing of such specifications and the question of power to grant any extension is squarely presented" (R. 74). The decision is based solely and squarely upon the view that, by deleting from General Order XXXII the provision "unless the time shall be shortened or enlarged by special order of the judge", and by inserting the requirement that the specifications shall be filed on the return day, this Court must necessarily have intended to put it beyond the power of the bankruptcy court to grant any extension whatever.

Specifications of Error.

1. The Circuit Court of Appeals erred in affirming the order of the District Court dismissing the specifications herein and granting to the bankrupts and to each of them a discharge of their debts.

2. The Circuit Court of Appeals erred in ignoring the one day extension of time granted by Judge Goddard in the District Court for the filing of the specifications.

3. The Circuit Court of Appeals and the District Court erred in holding that under General Order in Bankruptcy XXXII, as amended April 17, 1933, the District Court in Bankruptcy no longer has power to grant any extension of time for filing specifications beyond the time fixed in the rule, to-wit, the return of the order to show cause why the bankrupts should not receive a discharge.

4. The Circuit Court of Appeals erred in giving amended General Order XXXII a construction inconsistent with its language and clear intent and with cognate provisions of the Bankruptcy Law and the General Orders.

5. The Circuit Court of Appeals erred in holding, in effect, that amended General Order XXXII, when construed to prohibit the granting of any extension of time for the filing of specifications beyond the return day, was not contrary to and in conflict with the Bankruptcy Law.

Summary of Argument.

I

The primary purpose of the 1933 amendment of General Order XXXII was to deprive creditors of an absolute right to a ten-day delay between the return day and the time for filing specifications—during which unscrupulous creditors could use, and had been using, the threat of opposition to discharge in order to force bankrupts to "buy them off."

II

That purpose was fully accomplished by changing the normal time for the filing of specifications. The omission of express grant of power to allow extensions was not essential to its accomplishment, and it cannot properly be inferred therefrom that this Court intended to abrogate a power in the Bankruptcy Court theretofore well settled both under the General Order and upon general principles.

III

The amended General Order must be construed in the light of this purpose.

IV

Compelling reasons of policy require the conclusion that it was not intended to take away the Bankruptcy Court's power to grant extensions of time for the filing of specifications.

ARGUMENT.

I

The primary purpose of the 1933 amendment of General Order XXXII was to deprive creditors of an absolute right to a ten-day delay between the return day and the time for filing specifications—during which unscrupulous creditors could use, and had been using, the threat of opposition to discharge in order to force bankrupts to "buy them off."

It will be perceived that in addition to omitting the express provision for an extension of time, the General Order changes the *normal time* for the filing of specifications and requires that they shall be filed at the same time that the creditor appears in opposition to discharge, instead of ten days thereafter. We believe that the important and controlling changes in the General Order lie in the fact of the change of the normal time and of the deletion of a period which the creditor theretofore had, *as an absolute right,* during which to file specifications. While the Court's reasons for the amendment of this General Order have not been made public, the character of the change makes it quite clear that the Court had in mind the correction of the evil adverted to in the Attorney General's Report on Bankruptcy Law Practice (Senate Document No. 65, 72d Congress, 1st session) and again in the "Donovan" Report on the Administration of Bankrupt Estates (House Committee Print, 71st Congress, 3d session).

Both of these reports show that, under General Order XXXII as it stood before the amendment, unscrupulous creditors were using the period, given them *as of right* within which to file specifications in opposition to dis-

charge, in order to force bankrupts to "buy off" the opposition to discharge.

The Donovan report, commenting upon General Order XXXII as it then stood, states:

> "An unscrupulous creditor who desires to get something more than the others may be tempted to file a notice of appearance (a simple 4-line document) at the time of the hearing on confirmation, knowing that this will hold up the entire proceeding for at least another 10 days even if he does not follow up the notice of appearance with detailed specifications of objection. During this 10-day period he may hope to get paid off by the bankrupt. If the bankrupt refuses or is unable to strike a bargain, the creditor may then file his specifications of objection, so that the bankrupt will face another three weeks' delay, during the process of which he may be finally induced to come to terms" (p. 116).

The Attorney General's report states:

> "The clerks of 72 district courts reported to us that, out of the 49,928 cases closed by them in the fiscal year 1930, 27,426 applications for discharge had been disposed of. In only 1,042 of these cases individual creditors at the time of the hearing before the judge on the bankrupt's application filed notices of appearance stating that they intended to oppose the discharge. Under General Order XXXII, these creditors were then required to file specifications in writing within 10 days, setting forth the grounds of this opposition, upon the filing of which the issues would be tried. But in 330 of these 1,042 cases the creditors did not follow up their notices of appearance by filing written specifications. Why? Presumably, because the creditors were either bought off by the bankrupt as already described, or became indifferent, or were unwilling to incur further expense * * *."

The purpose to correct this evil is so clearly apparent from the form of the amendment that it seems strange that the courts which have heretofore considered the instant question have not adverted to it.[2] We believe that the failure to consider the amendment in the light of this purpose has led the courts below in this case, and other courts which have reached similar results, into error.

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[2] The only other Circuit Court of Appeals which has considered this question has held that the amended General Order does not take the power of extension away from the Court. *In re Lerner*, 70 F. (2d) 938 (C. C. A. 7, 1934), copending with the instant case on writ of certiorari. It may also be noted that Judge Knox recently refused to follow the decision rendered by Judge Patterson on this question in the instant *Reichert* case, although that case and the decisions in *In re Hodges*, 4 Fed. Supp. 804 (D. C. U. S., Conn., affirmed on the ground that good cause had not been shown—the question of *power* to extend being pretermitted—*sub nom. United Wall Paper Factories* v. *Hodges*, 70 F. (2d) 243, C. C. A. 2, 1934) and *In re Corcoran*, 4 Fed. Supp. 988 (D. C. U. S., Mass.), were called to his attention. In the *Matter of Palestine* (No. 58229, unreported) Judge Knox delivered the following opinion denying the motion to strike specifications which had been filed two days after the return day pursuant to an order of extension which had been granted upon the ground that the creditor's out-of-town attorney was unfamiliar with the recent amendment to General Order XXXII:

> "Motion denied. While the reported decisions cited by petitioner would seem to justify the relief sought, it is difficult for me to believe that a failure to file specifications of objections to a bankrupt's discharge upon the return day will, in all circumstances, bar the subsequent filing of such specifications. The matter should be decided by the appellate court. Here, there was no objection interposed in the action of the court in extending time in which to file objections—also there was no express consent by the attorney for the bankrupt."

Even after the decision of the Circuit Court of Appeals affirming the *Hodges* case, *supra*, Judge Knox reiterated his stand in the *Palestine* case by denying, with opinion, a petition for rehearing, in which the bankrupt had again attacked the extension of time. (Judge Knox's opinion on rehearing in this *Palestine* case is referred to and quoted from at pp. 17-18 *post* in this brief.)

II

That purpose was fully accomplished by changing the normal time for the filing of specifications. The omission of express grant of power to allow extensions was not essential to its accomplishment, and it cannot properly be inferred therefrom that this Court intended to abrogate a power in the Bankruptcy Court theretofore well settled both under the General Order and upon general principles.

It cannot be maintained that the evil sought to be corrected by the amendment to this General Order required that all power be taken from the bankruptcy court to allow an extension of time for the filing of specifications. If the objecting creditors must actually appear upon the return day and then either file their specifications or show good cause for a reasonable extension of time, they certainly will not be able to count upon having any time for the use of a lever to force special terms from the bankrupt.[3] It might be suggested that the omission of the express power to grant an extension must be inferred to be a prohibition of that power in order to guard against laxity by the District Judge in the granting of extensions of time. Preliminarily, it is perfectly clear that there was no laxity in the instant case. The extension granted was for one day only. There were certainly good grounds for an extension, as the Circuit Court of Appeals in its opinion admits. If lax-

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[3] The Bankruptcy Rules of the District Court of the United States for the Southern District of New York supply an additional safeguard against this in providing in Rule XIX: "In the event of any withdrawal of such opposition, no discharge shall be granted unless the bankrupt and his attorney make affidavit that no consideration has been promised or given for such withdrawal. If specifications be withdrawn or appear not to be prosecuted in good faith, the Special Master shall inquire and report to the Court as to whether the opposition ceased by reason of illegal or improper acts."

These rules became effective July 1, 1931, prior to the amendment of General Order XXXII.

ity in the administration of the Bankruptcy Rules and Orders was feared, certainly some less drastic provision could have been made. It may well have been provided that extensions should not be granted by the referee, but only by the court itself, and only after a full hearing and a showing of good cause, and that they should be limited in point of time. If thought necessary, such views can now be expressed by this Court.

But entirely to abrogate any power of extension not only seems unnecessary, but seems to be inconsistent with views this Court has recently expressed in other fields. As this Court is aware, bankruptcy cases are often complex, and creditors are frequently able to learn the true facts only with difficulty. See *Cooper* v. *Dasher*, 290 U. S. 106, 109. Special circumstances, such as the illness of important creditors or witnesses, may require special treatment. In *Pokora* v. *Wabash Ry. Co.*, 292 U. S. 98, 105, 106, this Court adverted to the impropriety of laying down inflexible standards of conduct, which amount to rules of law. Said Mr. Justice Cardozo, speaking for the Court:

> "Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. * * * Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal."

And, with specific reference to the question of the amendment of pleadings, this Court, in the *Claims Amending* cases, has recently rendered most liberal decisions. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 68; *United States* v. *Factors & Finance Co.*, 288 U. S. 89, 93.

These considerations lead to the conclusion that there is no *reason* for drawing the inference which has been drawn

by the courts below from the mere omission from the amended Order of the express grant of the power to allow extensions. Explanation for the omission may be found in the fact that such a grant is entirely unnecessary, for the bankruptcy courts in the absence of a prohibition already possess such power. This explanation of the omission has recently been advanced in the latest edition of a standard text on bankruptcy. Remington on Bankruptcy, 4th Ed., Vol. 7, sec. 3201, p. 427 (1934), says:

> "Although the express permission of former General Order 32 that the time for filing specifications in opposition to the discharge might be shortened or enlarged by special order of the judge was eliminated when the Supreme Court amended the General Order in 1933, yet it cannot rightly be inferred from such change that the general power of courts to grant extension of time in remedial matters is in this particular abrogated; indeed, the retention of the requirement that appearance in opposition must be entered in writing on the return day, while at the same time, it is prescribed that specifications in writing are to be filed also on the return day, would carry the necessary implication that, on occasion, an extension of time to file the specifications might be granted; otherwise there would not be the double requirement of the entry of appearance on the return day and of the filing of the specifications on the same day, since the specifications themselves would constitute the most positive form of entry of appearance in opposition. *Perhaps the expressing of the power to grant such extension was eliminated precisely because unnecessary.*" [Emphasis ours.]

Specifications in opposition to a discharge in bankruptcy are pleadings, (*Manson* v. *Inge*, 13 F. (2d) 567-568 (C. C. A. 4, 1926); *In re Scheffler*, 68 F. (2d) 902, 903 (C. C. A. 2, 1934); *In re Lerner*, 70 F. (2d) 938 (C. C. A. 7, 1924); *cf.*

Tucker v. *U. S.*, 151 U. S. 164, 168) and Federal courts, including courts of bankruptcy, have an inherent power to grant an extension of time for the filing of pleadings. Remington on Bankruptcy, *supra; Strohbar* v. *Dwinnell,* 29 F. (2d) 915, 916 (C. C. A. 5, 1929); see *Lockman* v. *Lang,* 132 Fed. 1, 6 (C. C. A. 8, 1904, per Sanborn, J.).

The lack of necessity for an express provision in General Order XXXII giving the Bankruptcy Court power to allow an extension of time is shown not merely by the fact that the court would have inherent power in any event to do so, but by the fact that the bankruptcy courts are already given this power by a provision of the Bankruptcy Act and by the provision of another General Order. Section 2 (15) of the Bankruptcy Act (11 USC 11(15)) gives the courts of bankruptcy power to:

> "• • • make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act."

And General Order XXXVII provides that:

> "• • • the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading • • •."

It seems clear that under Section 2 (15) of the Act the bankruptcy court would have power to make an order of extension on the facts of this case, irrespective whether that power is expressly granted by any General Order. One of the purposes of the Bankruptcy Act, as expressly shown by Section 14 (b) (11 USC 32 (b)), is to refuse discharges to dishonest bankrupts guilty of fraud as specified in that section. The specifications in opposition to discharge in this record, and the testimony of record (R. 14) clearly show that these bankrupts have been charged

with, and, as we think, are guilty of, the grossest fraud. Good cause for an extension of time (the serious illness of the president of the objecting creditor and his non-availability to authorize the execution and filing of specifications containing such serious charges; the complexity of the case; and the difficulty of ascertaining the true facts) was shown. The extension was granted for but one day. Can it seriously be urged that it is not within the intent of the quoted provision of Section 2 (15) of the Bankruptcy Act to give the bankruptcy courts the power to make such an extension in such a case in order to enforce the very purposes of the Act? The 1933 amendment of General Order XXXII should be construed in harmony with the fair intent of Section 2 (15) of the Bankruptcy Act.

III.

The amended General Order must be construed in the light of this purpose.

The intention of this Court in framing and promulgating General Order XXXII is the governing question. It has been thoroughly settled since the time of Bacon (Bacon Abridgement, Statutes I, 5, 6) that the intention of the law makers is governing; that a thing which is within that intention is as much within the statute as if it were within the letter, and that a thing within the letter is not within the statute unless it be within the intention of the law makers; and that where the law makers do not use language necessarily covering the case before the court, it is the duty of the court to ask itself what answer the law makers would have made had they posed the specific question, and then to construe the statute as it shall answer such question.

These principles have had abundant and reiterated approval and support both from this Court[4] and from the State Courts.[5]

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[4] Among the many cases of this Court approving these principles there may be cited *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 464, 465; *Ozawa* v. *U. S.*, 260 U. S. 178, 194; *Barrett* v. *Van Pelt*, 268 U. S. 85, 90, 91; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212; *Smythe* v. *Fiske*, 23 Wall. 374, 380.

[5] The leading case in this country is the New York case of *People* v. *Utica Insurance Co.*, 15 Johns. 358, 381, a decision which has been approved repeatedly by this Court, see cases cited in note 4, *ante*. These principles have been reiterated and applied to scores of cases up to the present day. Among recent decisions which may be mentioned are *City Bank F. T. Co.* v. *N. Y. C. R. R. Co.*, 253 N. Y. 49, 57 (1930) and *Surace* v. *Danna*, 248 N. Y. 18, 21 (1928), both by Chief Judge (now Mr. Justice) Cardozo.

In the *City Bank* case it was said:

> "In the construction of a statute, adherence to the written word will not be suffered to 'defeat the general purpose and manifest policy intended to be promoted' (*Spencer* v. *Myers*, 150 N. Y. 269, 275; *Surace* v. *Danna*, 248 N. Y. 18, 20. The intent, when discovered, will prevail over the letter (*Smith* v. *People*, 47 N. Y. 330, 336; *People ex rel. Jackson* v. *Potter*, 47 N. Y. 375, 379; *Bell* v. *Mayor*, 105 N. Y. 139, 144; *Blaschko* v. *Wurster*, 156 N. Y. 437, 442)."

If, therefore, the express language of a statute will not be permitted to defeat or go beyond the intention of its framers, it is self-evident that a mere inference drawn from the deletion of language from a statute will not be suffered to govern when the intention is clearly shown. These principles should be applied to the construction of the General Order here in question, in the light of the situation which confronted the court at the time of the revision of the General Orders and in the light of the evil intended to be suppressed and of the measures necessary for effective suppression.

In the *Surace* case it was said:

> "The exemption must have a meaning consistent with the policy behind it. Few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension. The thought behind the phrase proclaims itself misread when the outcome of the reading is injustice or absurdity (*Smith* v. *People*, 47 N. Y. 330, 341, 342; *Matter of Meyer*, 209 N. Y. 386, 389). Adherence to the letter will not be suffered to 'defeat the general purposes and manifest policy intended to be promoted' (*Spencer* v. *Myers*, 150 N. Y. 269, 275; *People ex rel. Wood* v. *Lacombe*, 99 N. Y. 43; *Matter of Folsom*, 56 N. Y. 60, 66; Kent's Comm. 462)."

IV.

Compelling reasons of policy require the conclusion that it was not intended to take away the Bankruptcy Court's power to grant extensions of time for the filing of specifications.

The reasons of policy, heretofore referred to in this brief, which require that the bankruptcy courts shall have the power of extension, are that it is necessary to have the power to take care of exceptional cases, where through the illness or unavoidable absence of an important creditor or witness, or where counsel for objecting creditors cannot secure essential information or authority, or where through the complexities of the case or the machinations of the bankrupt, or both, definite information cannot promptly be obtained.

There is, however, another important reason of policy against the construction which has been given to amended General Order XXXII by the courts below in this case. There is nothing in the Bankruptcy Act or in the General Orders to prevent the District Judge from adjourning the return date of the rule to show cause for all purposes and thereby adjourning the whole discharge proceeding. When such a motion is granted, the specifications, of course, are not due to be filed until the adjourned return date. Many applications for such adjournments have been presented in the district courts in the Second Circuit and have been granted when good cause was shown by objecting creditors.[6] As stated by Judge Knox in the recent unreport-

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[6] There have been numerous cases, but for reference purposes it is sufficient to refer to

Matter of Brownstone (No. 51039, unreported);
Matter of Horn (No. 59116, unreported);
Matter of Bernstein (No. 57099, unreported).

Indeed, at an earlier stage of this case, there was an adjournment of the return date on the opposition to discharge granted by agreement.

ed case of *Matter of Palestine* (No. 58229, unreported):

> "The matter of the right of the court to exercise its discretion with respect to adjourning the application for discharge for all purposes is constantly arising, as well as the right of the court to grant extension for the reasons which appeal to its sense of justice."

The conclusion seems justified that if the district judges generally find no means of avoiding such an interpretation of General Order XXXII as will amount to a denial of justice and a great hardship to objecting creditors, they will adopt the method which has already been put into practice in the district courts in the Second Circuit and grant an adjournment of the return day and of the whole discharge proceeding for all purposes. But such a procedure, it should be borne in mind, may, in some cases, work an injustice upon the bankrupt, for if the return day is adjourned, additional creditors may appear and file specifications other than those who appeared, or were ready to appear, on the original return day. It would seem to be preferable, we submit, to conclude that it is impossible that this Court could have intended by the 1933 amendment of General Order No. XXXII to have put into force a rule plainly calculated to work injustice and which in practice has done so;[7] that it would be better to construe the General Order as not intended to prevent the grant of such extensions of time to file specifications upon good cause shown, rather than have such extensions accomplished cumbrously and circuitously.

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[7] In *Hawaii* v. *Mankichi*, 190 U. S. 197, 214, and again in *Sorrells* v. *United States*, 287 U. S. 435, 448, 468, the Court referred with approval to the following language of the Master of the Rolls (afterwards Lord Esher) in *Plumstead Board of Works* v. *Spackman*, L. R. 13 Q. B. D. 878, 887:

> "If there are no means of avoiding such an interpretation of the statute," (as will amount to a great hardship,) "a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended."

Conclusion.

We submit, therefore, that the suppression of the evil to be feared is fully accomplished by the express language of the General Order as amended—that is, by removing the provision giving a ten day period as of right during which unscrupulous creditors may use threats to force special treatment of them; that the suppression of that evil did not require the abrogation of the power of the bankruptcy courts to grant reasonable extensions upon good grounds shown; that the express grant of such powers was omitted because such a grant was unnecessary; that there is nothing to indicate that this Court intended to place any restrictions upon the bankruptcy courts in this regard; that such a restriction would be inconsistent, if not in conflict, with a provision of the Bankruptcy Act and another provision of the General Orders; that it would amount to the announcement of an arbitrary rule not consonant with the decisions of this Court; and that it might lead, and indeed has led, to subterfuges to avoid the rule in hard cases, which might well prove more dangerous than recognition of the power itself.

It is respectfully submitted that the orders of the Circuit Court of Appeals and of the District Court (Judge Patterson) in this case should be reversed, and that the validity of the order of Judge Goddard in granting the extension of time should be sustained.

HOWARD MYERS,
JOSEPH K. GUERIN,
SAUL S. MYERS,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. .....

LAWYERS COUNTY TRUST COMPANY,

Petitioner,

vs.

WILLIAM REICHERT and PAUL KOLLMAR, individually and as co-partners trading under the name of W. Reichert & Co.,

Bankrupts.

BRIEF FOR BANKRUPTS, WILLIAM REICHERT AND PAUL KOLLMAR, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

William Reichert and Paul Kollmar, individually and as co-partners trading under the name of W. Reichert & Co. respectfully submit the following to this Honorable Court, in opposition to the petition for the writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, made herein by the Lawyers County Trust Company.

Summary and Short Statement of the Matter Involved.

A petition for discharge was made by the bankrupts herein to the District Court and upon the date set for the hearing thereof, the Lawyers County Trust Company, a creditor of the bankrupts, appeared

by counsel who stated to the Court that it wished additional time within which to file specifications of objections to the petition for discharge. Counsel for the creditor did not petition the Court for an adjournment of the hearing itself, but limited his plea to an extension of time for the purpose of filing the specifications. The Court extended the time to file specifications until four o'clock of the same day (R. 91). Thereafter, on the same day, and in the absence of counsel for the bankrupts, a further extension of time to file the specifications was sought and, without any notice to counsel for the bankrupts (R. 94), the Court granted this creditor leave to file its specifications on the following day. The specifications were thus filed and a motion was subsequently made by the bankrupts for an order to vacate the specifications and to enter the discharge of the bankrupts on the ground that the District Court had no power to extend the time to file specifications in view of General Order XXXII, as amended April 17th, 1933 (R. 88-90). Judge Patterson of the District Court granted the motion and rendered an opinion wherein he stated, in part, as follows (R. 97-98):

> "It seems manifest that the judge no longer has power to extend the time for interposing specifications beyond the time fixed in the rule. The dropping of the clause that allowed elasticity must be deemed to have been deliberate and intended to work a change in the practice. * * * The Court had no power to extend the time for filing specifications beyond the return day of the application. The specifications were filed too late and must be disregarded."

The Circuit Court of Appeals affirmed the decision of the District Court and agreed with the Dis-

trict Court that the change in General Order XXXII had been deliberate (R. 110) and for the purpose of removing from the District Court any discretion, which it might have had previously with respect to the extension of time for filing specifications. The decision interprets the change of General Order XXXII by the amendment of April 17th, 1933, in the following manner (R. 110):

> "Before, the Judge had the express power to shorten or enlarge the time for filing specifications of objection, but by the amendment all such power was withdrawn. Indeed, the sole purpose of the amendment, aside from including an extension proposal within its coverage, seems to have been to do away with this express power and more strictly limit the opportunity to create delays in administration, even at the expense of some flexibility."

Reasons Relied on for Denial of Writ.

(1) The decision of the Circuit Court of Appeals for the Second Circuit, logically and properly construes General Order XXXII, for this Order is mandatory in its terms and conditions and permits the District Court no exercise of discretion to vary or extend the terms and provisions.

Prior to the amendment of General Order XXXII on April 17th, 1933, its context was as follows:

> "A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the

> grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge."

The amendment altered it to read:

> "A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall at the same time file a specification in writing of the grounds of his opposition."

The substance of the General Order was retained in its amended form, except in three respects; (1) specifications of objections to extension proposals are included within the scope of the Order; (2) all specifications must be filed on the day set for the hearing; and (3) the clause granting the discretionary power to extend or vary the time for filing the specifications has been deleted in its entirety and forms no part of the amended order.

In the words of the Circuit Court of Appeals, Second Circuit (R. 110), "The change was, of course, deliberate, and appears to us to be highly significant". The omission of the discretionary clause was deliberate and solely for the purpose of compelling the filing of the specifications on the return day. The deliberateness and significance of the deletion becomes all the more apparent upon an inspection of the blanket order of April 17, 1933. Of all the General Orders included in the blanket order and dealing with the time within which pleadings must be filed, General Order XXXII is the only Order from which the discretionary clause has been omitted. General Order XXXI, Subdivision 3, dealing with the filing of objections to a proof of assignment of claim in bank-

ruptcy, and General Order *L*, Subdivision 4, dealing with confirmation of farmers petitions for relief under section 75 of the Bankruptcy Act, are each General Orders governing the time within which to file pleadings. Like General Order XXXII, they were part of the blanket order of April 17th, 1933, yet each of these orders contains the specific authorization for the exercise of discretion with reference to extension of time to file pleadings. The inclusion of such authorization in General Orders *L* and XXXI and its deletion in General Order XXXII is significant and can only lead to the conclusion that this Court in amending General Order XXXII proposed to remove from the District Court any discretionary powers which it might have had with respect to extension of time to file specifications.

The significance of this omission was pointed out by Hincks, *J.*, in the matter of *Re Hodges,* 4 Fed. Sup. 804, affirmed on other grounds, C. C. A. 2nd, April 2nd, 1934, 10 F. (2) 243, wherein the Court sustained the contention of the bankrupt that the terms of General Order XXXII were mandatory and that there, therefore, remained no discretionary power in the District Court to vary or enlarge the filing period.

Lowell, *J.*, in *Re Corcoran,* 4 Fed. Sup. 988, also took cognizance of the apparent purpose of the amendment and denied the motion of a creditor to open his default and to permit him to file specifications subsequent to the date set for the hearing upon the discharge. The denial of the motion was based solely on the ground that General Order XXXII would not permit the exercise of any discretion in extending the time for filing such specifications.

Indeed, it is evident that the sole purpose of the amendment, aside from including an extension proposal within its scope was to do away with this discretionary power and more strictly limit the opportunity to create delays in administration, even at the expense of some flexibility. This Court was surely cognizant of the fact that creditors employed the ten day period and the extended period for the purpose of dealing with bankrupts to obtain preferences. The Attorney General's Report on Bankruptcy Law and Practice (Senate Document #65, 72nd Congress, First Session) and the "Donovan" Report on the Administration of Bankrupt Estates (House Committee Print, 71st Congress, 3rd Session), cited by the petitioner herein, state in detail the practice and its prevalency. The petitioner states that this Court undoubtedly had these reports before it, but that the real purpose of the amendment was to delete the provision giving the creditor ten days "as of right", although still permitting the District Court to grant enlargements on "good cause shown". The fallaciousness of this conclusion is apparent. The retention by the District Court of such discretion would in no way tend to correct the evil practice which this Court attempted to destroy, for it is obvious that the facts upon which an unopposed application for extension might be based could be such that the Court could not verify their truth or falsity. In many of the cases wherein creditors have attempted to deal with bankrupts, the ten day period had been extended for alleged "good cause shown". "Good cause" can always be made out and because of the fact that it was impossible for the Court of its own motion, to verify such "good cause", the practice continued.

If the petitioner's interpretation of General Order

XXXII is the correct one, then we must conclude that this Court has failed to provide proper weapons to combat the evil practice. This Court did not contemplate the making of a futile order. And such it must be if the District Court is to retain this power.

In substantiation of its contention, the petitioner cites Remington on Bankruptcy, Volume 7, section 3201, page 427 (1934). We must dismiss the views advanced by Mr. Remington as being based upon a misinterpretation of General Order XXXII. The Court will observe that the author is under a mistaken impression that General Order XXXII requires an appearance in writing. From that premise, he urges that the filing of an appearance in writing would be superfluous, as specifications which are required by the order to be filed on the same day, are, in themselves, an appearance. He does not believe that the Supreme Court intended a double requirement and, therefore, concludes that the Supreme Court must have intended that specifications might be filed at a later date. The fallacy in this argument is apparent for there nowhere appears any provision or requirement for a written appearance in opposition and the implication which he draws would not follow even if such an appearance were necessary. It should also be noted that Mr. Remington bases his argument solely upon decisions rendered previous to the amendment of General Order XXXII and which are, therefore, not in point.

(2) The decision of the Circuit Court of Appeals for the Seventh Circuit is erroneous and is based upon a misinterpretation of the terms, purposes, and effect of General Order XXXII.

The case of *In re Lerner,* 70 Fed. 2d, 938, C. C. A. 7, has been cited by the petitioner as conclusive of

the fact that General Order XXXII has not deprived the District Court of the power to grant extensions of time within which to file specifications of objections to the discharge of the bankrupt. The Court, in the *Lerner* case, *supra,* at page 939, states as follows:

> "We are not persuaded that the amended order was intended to so restrict or limit the Court who is, of necessity, in the best possible position to determine whether extensions of time should be granted or whether pleadings should be amended."

The decision in the aforementioned case is apparently based upon the premise that specifications of objections are such pleadings as are subject to the general power of the Court to grant extensions of time and to amend such pleadings (General Order XXXVII). It seems to us that the conclusion of the Circuit Court of Appeals, Second Circuit, is the more logical one. The Court therein stated as follows (R. 110-111):

> "That the specifications of objections must be considered a part of the pleadings is evident. Yet we do not think such specifications can properly be classed with pleadings generally and the time for filing varied in the discretion of the judge because for many years they have for this purpose been especially dealt with in General Order XXXII and still are. That order has the force of a specific statute relating to its subject matter, *Wilkinson* v. *Walker,* 292 Fed. 395, and must, under familiar rules of construction, take precedence over general legislation which might otherwise control. The change was merely one of procedure and not of any substantive provisions of the law and so clearly within the power of the Supreme Court."

It is apparent that the foregoing opinion is based upon the fundamental principle of statutory construction that specific legislation takes precedence over general legislation. The Court, in the *Lerner* case, seems to have overlooked this principle of law in its interpretation of General Order XXXII. The Circuit Court, in deciding the *Lerner* case, *supra,* gives no reason for its denial of the unmistakable mandate contained in the language of General Order XXXII, other than its belief that the District Court, being a General Court of Equity, still retained its "discretion in matters that are primarily those of pleading". That Court seemingly based its opinion upon the provisions of General Order XXXVII which cannot be set up herein as the basis for the contention that the Bankruptcy Court has been permitted to retain the right to "vary the time allowed for return of process". The title of this General Order is "General Provisions" and the wording of this title is indicative of the effect and purpose of the order itself. It is merely a statement as to the powers of the Bankruptcy Court generally and is at all times subject to the provisions of the specific statute or order. General Order XXXVII is limited in its scope and effect by the terms and provisions of General Order XXXII, which contains a specific provision with respect to the time within which specifications must be filed.

It should also be pointed out to this Court that the Circuit Court in *Re Lerner, supra,* has apparently misconstrued the terms of General Order XXXII. In its opinion, the Court states as follows:

> "The order does fix the time within which objections shall be filed. Specifications are merely elaborations of the objections. The

> order does not, however, prescribe procedure in case objections are made within the designated time.
>
> (2) Objections, we take it, may be made orally in open court. Having been thus made, they should be reduced to writing and filed on or before the return day. They must likewise be accompanied by or followed by specifications * * *."

A reading of the general order does not make evident just what are the objections which are referred to. Other than the specifications and the appearances, no mention is made of any additional pleading to be filed or entered on the return day. The nature of the objections referred to are not disclosed by the Court, excepting in its statement that "objections, we may take it, may be made orally in open Court". No provision has been made for oral objections and any discussion based upon the presence of such objections must be deemed without merit.

The statement, therefore, by the Court that objections may be made on the return day and that specifications which are merely "elaborations of the objections" may be filed at a later date must be disregarded.

(3) The decision in *McIntosh* v. *Seymour,* 292 U. S. 652, cannot form the basis for any conclusion that the Supreme Court has decided the questions involved herein.

This Court, on June 4th, 1934, denied the petition for a writ of certiorari in the case of *McIntosh* v. *Seymour,* without setting forth the reasons for such denial. The petition was for a certiorari to the deci-

sion of the Circuit Court of Appeals, for the Ninth Circuit, wherein the Court, exercising its discretion under Section 24b of the Bankruptcy Act had refused to allow an appeal from an order denying the motion of the bankrupt to dismiss the specifications. This case can form no part of the discussion herein as the denial of the writ was no doubt made on the ground that the decision of the Circuit Court of Appeals for the Ninth Circuit was merely a discretionary refusal to allow an appeal and that, therefore, this Court did not have jurisdiction to entertain the writ (*Ferguson* v. *District of Columbia,* 270 U. S. 633).

(4) Decisions interpreting General Order XXXII prior to its amendment in 1933 are wholly irrelevant and superannuated and cannot form the basis for the contention that the Bankruptcy Court has the power to grant extensions of time to file specifications.

WHEREFORE your petitioners respectfully pray that the petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit be denied and that review of the decision of such Circuit Court be refused.

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